ployer will have no more molding to be polished, all of his metal polishers will be terminated, the bargaining unit will disappear, and so will his relationship with the second union.

Did the employer commit an unfair labor practice by failing to bargain with the union about the decision to eliminate bright work from his new model? Is it the law that the design of next year's model, if it may create a situation which will affect working conditions, is a decision to be made jointly by the company and the union through collective bargaining?

Hypothetical Case No. 3: Let us suppose a company is engaged in manufacturing parts for experimental aircraft and production parts for conventional aircraft. The company finds that its orders for the experimental parts are unprofitable; but that its orders for production parts are very profitable. The shift in the product mix to more production parts requires some shift in the proportions of skills required in the plant and may lead to downgrading or layoff of some skilled men and perhaps employment of others of lesser skills. Arguably, the company must bargain about the downgrading and the layoffs. Indeed, his collective bargaining agreement probably embodies the results of such bargaining. But, will the Board rule that the decision whether to reject the unprofitable order and to seek and accept the additional orders for production parts, must be a joint decision by the company and the union, with the results embodied in a collective bargaining agreement?

Hypothetical Case No. 4: Let us suppose that a company engaged in making electronic components has an extensive research and development program which costs a great amount of money. The management concludes, as a matter of business judgment, that by curtailing its research and development program, and relying upon the

inventions of others, it can better promote the growth and prosperity of the company.

Will the Board rule that the decision to curtail the research and development program must be made jointly by the company and the union through collective bargaining with the results embodied in an agreement?

Hypothetical Case No. 5: Let us suppose the same electronic components manufacturer has the same research and development department. The director of that department dies and a new director must be selected.

A great deal turns upon the outcome of the selection of a new director. If a poor selection is made, new developments and inventions may not be forthcoming; the company's competitive position may be affected; orders may drop off; and fewer employees may be needed. The company has two candidates for the job, Doctor X and Doctor Y. Is the decision whether to appoint Doctor X or appoint Doctor Y to be made jointly by the company and the union through collective bargaining? And if the company simply appoints Doctor X unilaterally, without first notifying the union and bargaining with it, has it violated § 8(a)(5) of the Act?

These five hypothetical cases may seem farfetched. But are these cases beyond the realm of possibility? Certainly the hypothetical case of buying a new machine is not. That is the Board's decision in *Renton News Record.*[4] Certainly the hypothetical case of turning down the unprofitable order is not. That is a trial examiner's decision in the *William J. Burns International Detective Agency.*[5] Certainly the hypothetical does not go beyond the trial examiner's decision that Shell Oil Company must bargain

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[4] *Renton News Record,* 136 NLRB 1294 (1962).

[5] TXD 188-64; DLR No. 78 April 21, 1964.

with the union about whether it transports gasoline to Lansing through Grand Haven rather than through Detroit.[6]

The fundamental error of the Board's ruling is its misconception of the duty to bargain. It believes that an employer must bargain about any managerial decision which affects his employees. Since every business decision affects conditions of employment in some manner, the logical reach of the Board's decision is to make virtually every managerial decision a required subject for bargaining.

The Act, on the other hand, provides that the employer must bargain only with respect to wages, hours, and other terms and conditions of employment. Neither the statute nor Congressional debates indicate that employers must bargain with respect to every business decision which may affect conditions of employment.

The members of the Board, however, are not persuaded by the Act and Congressional debates. The new majority of the Board apparently believe that they have an electoral mandate to change the economic structure of the country so that every business decision is made by a joint company-union committee. We respectfully submit that the Board has received no such mandate either from Congress or from the election returns.

It Is Not Within the Board's Province to Solve the Problems Created by Technological Progress

The major premise of the Board's reasoning does not appear in the *Fibreboard* decision.[7] Nevertheless, the be-

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[6] *Shell Oil Company*, TXD 199-64; DLR No. 76, April 17, 1964.

[7] When an agency fails to disclose the grounds for its decision, the parties and courts must glean unofficial sources in order to determine the basis for the agency's action. Such

lief that restrictions on an employer's business judgment may alleviate the problems associated with automation or technological progress appears to be an important consideration for the new majority of the members of the Board.

The Chairman of the Board, *Frank McCulloch*, is most candid by stating:

> "Automation has forced a change in thinking—in fact, that is what automation really is—a rethinking of industrial process . . . In its small way the Board is attempting, *under the mandate of Congress*, to help management and labor to join together to solve this, the most basic of their problems." McCulloch, *An Evaluation of the Remedies Available to the NLRB*, 56 LRR 262, (June 29, 1964)

Another Board member, John Fanning, referred to the matter as follows:

> "As I stated in my dissent in the first *Fibreboard* case, the duty of an employer to bargain with his employees' representative concerning subcontracting operations had been considered and decided more than 15 years ago (*Timken Roller Bearing Company*, 70 NLRB 500). However, today the twin problems of chronic unemployment and automation have given greater dimension to the issues involved;" Fanning, *The Duty to Bargain in 1962*, 51 LRRM 87 (1962).

A third Board member, *Gerald A. Brown* stated:

> "Before turning to some analysis of the changes, a word about my concept of the role of the NLRB is

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procedure by the Board here imposes a burden on the parties and lacks the bearing expected of the quasi-judicial agency. It is also contrary to the requirement of this court that "the orderly function of the process of review requires that the grounds upon which the administrative agency relies be clearly disclosed and adequately sustained." *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943); *Phelps Dodge Corp.*, v. *NLRB*, 313 U. S. 177 (1941).

> appropriate. We are an administrative agency entrusted with translating a general public policy formulated by Congress into varied and changing factual situations. While we, of course, are limited by the statute under which we operate, extensive discretion is granted to permit accomodations to the changing patterns. The labor problems of 1962 resemble those of 1935 only in a semantical sense.
>
> "The shadow of the future protend an increasing tempo of change—not only from the continuing technological revolution of automation, but from the impact of the developing new countries and other phases of our international relations.
>
> * * * *
>
> "Thus, in my view the Board is unquestionably a *policymaking* tribunal." Brown, *Defense of Recent NLRB Reversals of Decisions*, 49 LRR 364 (February 9, 1962).

We submit that the new majority of the Board has not received any direction from Congress to assume the role of a policymaker with authority to regulate industry's implementation of technological change. Recent developments also refute this claim of such a mandate.

A Senate committee has studied the problem of technology and automation;[8] a current Administration bill to establish a National Commission on Automation and Technological Progress has just been signed by President Johnson (August 1964); and a recent examination of the problem was also made in a report to the President from his Advisory Committee on Labor-Management Policy, entitled *"Labor-Management Policy Committee Report on Automation,"* 49 LRRM 35 (1962). But in none of these studies, bills, or reports is there any

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[8] "Toward Full Employment: Proposals for the Comprehensive Employment in the U. S.," Senate Committee on Labor & Public Welfare, 88th Cong., 2nd Session, Sen. Joseph S. Clark, Chairman.

authority for the Board to solve the problems of technological change.

Accordingly, we submit that the Board, without Congressional authority, is reaching out for new areas of control in its *Fibreboard* decision. The members of the NLRB do not have the competency or expertise to review this problem from all its aspects—productivity, modernization, and competition both domestic and foreign.

Further, the Board is not suited for this task because it tends to create confusion in this complex area rather than to afford a solution. Because of its lack of competency the Board sees the narrow rather than the over-all picture of the problem. Its decisions create industrial relations problems which cause havoc to collective bargaining.

According to the Board, if there are restrictions on an employer's right to contract out this will somehow mean that "business operations may profitably continue and jobs may be preserved." *Town & Country Mfg. Co.*, 136 NLRB 1022 (1962). This may not always be true, however. *Unless an employer is free to use his independent business judgment the result is an inability to compete and a consequent loss in the very jobs the Board is seeking to protect.* On the other hand, an efficient operation provides more for investment, improvement, and expansion which in turn has the effect of increasing productivity and the over-all total number of jobs. This is the real answer to unemployment.

We urge this court to reverse the Board's *Fibreboard* decision. The Board can then devote its time and effort aimed at reducing industrial strife within the confines of the law enacted by Congress. The scope of the duty to bargain should not be expanded without explicit authority from the Congress.

IV. CONCLUSION

We submit that the impact of the Board's decision, if sustained by this Court, will be a blow to the freedom of enterprise now enjoyed by employers throughout the country. It can eventually result in such a stranglehold on the initiative of employers that our economic growth will be irreparably damaged.

The new majority of the Board is reaching out for new areas of control without congressional authority. The *Fibreboard* decision subverts the constitutional requirement of separation of powers through its assumption of legislative authority.

For these reasons, we urge the Court to reverse the Board and the Court of Appeals for the District of Columbia and dismiss the complaint.

Respectfully submitted,

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. Secs. 151 et seq.) are as follows:

UNFAIR LABOR PRACTICES

Section 8(a) It shall be an unfair labor practice for and employer—

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

* * * *

(d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employers to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . . and the execution of a written contract incorporating any agreement reached if requested by either party . . .

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Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 14

FIBREBOARD PAPER PRODUCTS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 171–178) is reported at 322 F. 2d 411. The Board's findings of fact and its original decision and order (R. 35–43, 44–62) are reported at 130 NLRB 1558; the Board's supplemental decision and order (R. 19–32) are reported at 138 NLRB 550.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1963 (R. 179), and a petition for rehearing was denied on September 27, 1963 (R. 181). The petition for a writ of certiorari was filed on November 8, 1963, and was granted on January 6, 1964 (R.

183; 375 U.S. 963). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, infra, pp. 74–76.

QUESTIONS PRESENTED

1. Whether an employer's "contracting out" of maintenance work being done by employees in the bargaining unit is a statutory subject of collective bargaining under sections 8(d) and 9(a) of the National Labor Relations Act.

2. Whether an employer violated its duty to bargain under section 8(a)(5) by putting a decision to "contract out" such maintenance work into effect immediately upon the reopening of the existing collective bargaining agreement, without negotiation with the union.[1]

3. Whether the Board, in a case involving only a refusal to bargain, was empowered to order the resumption of operations which had been discontinued for legitimate business reasons and reinstatement with back pay of the individuals formerly employed therein.

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[1] Questions 1 and 2 break into its component parts the first of the two questions with respect to which certiorari was granted:

"Whether Petitioner was required by the National Labor Relations Act to bargain with a union representing some of its employees about whether to let to an independent contractor for legitimate business reasons the performance of certain operations in which those employees had been engaged."

STATEMENT

Petitioner company operates 20 manufacturing plants in five States (R. 172, 46; 101).[2] Since 1937 the Union[3] has been the exclusive bargaining agent for a unit of maintenance employees at the company's Emeryville, California plant, which numbered about 50 men in 1959 (R. 172, 35; 75, 102). On May 26, 1959, the Union gave timely notice of its desire to modify the existing collective agreement, which would expire July 31, 1959. The Union also sought to arrange a bargaining session on the proposed modifications (R. 172, 35, 47; 152, 153). There was no meeting until July 27, four days before the end of the contract term and approximately two months after the Union's notice (R. 172–173, 49; 75, 106, 152–155).

In the meantime, the company had undertaken an intensive study of the possibility of "contracting out" all maintenance work, effective on the expiration of its collective bargaining agreements with the various labor organizations representing its more than 70 maintenance employees (R. 173; 57–58; 104–105, 125–127).[4] By July 27, the company had determined that it was spending approximately $750,000 on its maintenance operations and that a substantial

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[2] References preceding a semicolon are to the facts as found by the Board and approved by the court below; those following are to the supporting evidence.

[3] East Bay Union of Machinists, Local 1304, United States Steelworkers of America, AFL–CIO.

[4] In addition to the approximately 50 maintenance employees covered by its agreement with the Union, the company had approximately 23 maintenance employees outside the major unit, who were represented by other unions (R. 122, 102, 75).

saving could be effected by contracting the work to one of four firms (R. 173, 57–58; 127–131). Accordingly, at the meeting with Union representatives the company delivered to them a letter, stating that it had reached "a definite decision" to let out the maintenance work effective August 1, 1959, and that "In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless." (R. 173, 49–50; 75–76, 117, 156.)

The Union protested that the company had no legal right to enter into a contract with a third party to do the work being performed by employees represented by the Union, and the meeting ended in discord (R. 50–51; 76, 118–119). On July 29, the Union sent a formal letter of protest to the company (R. 51; 157).

The parties met again on July 30 (R. 173, 52; 83–84, 120–121). By this date, the company had selected Fluor Maintenance, Incorporated as the contractor for the plant's maintenance work (R. 58; 79, 131–132, 137). At the opening of the meeting, the company's Industrial Relations Director, R. C. Thumann, distributed to the Union representatives copies of a letter, stating the company's view of the legal position and concluding (R. 53; 158–159):

> As we stated in our letter of July 27, it appears to us that since we will have no employees in the bargaining unit covered by our present Agreement, negotiation of a new or renewed Agreement would appear to us to be pointless. However, we repeat that we will be glad to discuss with you at your convenience any questions that you may have.

The Union representatives stated that they were ready to negotiate a collective bargaining agreement and asked for counterproposals to the Union's proposed modifications (R. 53; 84). The company refused (R. 53; 84).

In reply to questions about the company's reasons for contracting out the maintenance operations on such short notice, the Industrial Relations Director replied that it was more economical to have an independent contractor do the work, that the company had been considering the matter for "quite a period of time" because of high maintenance costs, and that the final decision had not been reached until July 27, when the Union was promptly notified (R. 53; 85–86). He added that, if the shortness of notice disturbed the Union, a deferral of the contracting to Fluor might be arranged (R. 86, 121). At the close of the meeting, all present signed the attendance record; Thumann added the following notation beside the names of the company representatives (R. 89, 122, 159):

> These representatives of Fibreboard are not in attendance for Contract Negotiations but to restate their opinion that negotiations for a new contract would be pointless in view of management's intention to contract out powerhouse and maintenance work.

The next day, July 31, 1959, the company distributed termination notices to all its maintenance employees, and the Union posted a picket line (R. 56; 92, 96, 165). Fluor started performing the maintenance work with the midnight shift, although its contract

(which was made retroactive to August 1) was not formally signed until several days later (R. 56; 95, 123). Because qualified personnel were not immediately available, Fluor was unable to furnish a full force of maintenance employees until August 24 (R. 123–124).

Upon the foregoing fact the Board found that the company's motive in contracting out its maintenance work was economic rather than anti-union. It dismissed the complaint insofar as it alleged that the company had discriminated against union members in violation of section 8(a)(3) of the Act. (R. 35, 57–61.) The Board (by a two to one vote) also concluded that the company "violated Section 8(a)(5) by unilaterally subcontracting its maintenance work without bargaining with the * * * [Union] over its decision to do so" (R. 24–25). The latter ruling applied the doctrine laid down in *Town & Country Manufacturing Company, Inc.*, 136 NLRB 1022, where the full Board (with two Members dissenting) held "that a management decision to subcontract work out of an existing unit, albeit for economic reasons, was a mandatory bargaining subject" (R. 20).[5]

The Board ordered the company to reinstitute the maintenance operation previously performed by its employees represented by the Union, to reinstate the

[5] The Board had originally dismissed the 8(a)(5) portion of the complaint in the instant case on the ground that a decision to subcontract was not a bargaining matter (R. 35–43). The Union and the General Counsel filed timely petitions for rehearing (R. 19; 167), which the Board granted because it had, in *Town & Country*, *supra*, changed its view on the subcontracting issue.

employees to their former or substantially equivalent jobs with back pay, and to bargain collectively with the Union (R. 27).

SUMMARY OF ARGUMENT

I

The "contracting out" of work done by employees in the bargaining unit is one of the subjects upon which the National Labor Relations Act requires employers and the representatives of their employees to bargain collectively. Sections 8(d) and 9(a) impose a duty to bargain about "terms and conditions of employment" or "conditions of employment." Since "conditions of employment" means literally the stipulations upon which men agree to hire or be employed, a provision concerning the contracting out of work of the bargaining unit is well within the literal meaning of the words. The words even more plainly cover termination of employment; and "contracting out" all the maintenance work in a plant to another employer is as indissolubly linked to the termination of the employment of the original maintenance employees as the two sides of a coin.

The same conclusion follows even if one looks to factors other than the literal sweep of the words. Since the term "bargain collectively" as used in the National Labor Relations Act "has been considered to absorb and give statutory approval to the philosophy of [collective] bargaining as worked out in the labor movement in the United States" (*Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 346), it is appropriate to look to the practices actually followed in

collective bargaining in order to determine what subjects of collective bargaining are embraced within Sections 8(d) and 9(a). As a matter of fact "contracting out" (or "subcontracting") had been brought, widely and successfully, within the framework of collective bargaining. That is demonstrated by the provisions of hundreds of collective bargaining agreements, orders and recommendations of government agencies, arbitration awards and judicial decisions.

A prime purpose of the National Labor Relations Act is to promote the peaceful settlement of potential industrial disputes by subjecting issues between management and labor to the mediatory influence of negotiation. In enacting the Act Congress took note of the fact that refusal to confer and negotiate had been one of the most prolific causes of industrial strife. Experience demonstrates that contracting out and other management practices affecting job security are, in fact, often major issues between management and labor. Nothing in the statute can dispel the employees' concern. Nothing in the law remotely suggests that, if bargaining upon the issue is not mandatory, employees can be denied resort to economic weapons. To hold that contracting out is a statutory subject for bargaining would promote the fundamental purpose of the Act by bringing a troublesome problem within the framework Congress established as most conducive to just and peaceable industrial relations. To hold otherwise would leave either party free to withhold the issue from the creative and mediatory influence of joint negotiations,

leaving it to fester and perhaps to break out in economic violence. Since a statute should be interpreted to give effect to its purposes, wherever that construction is consistent with the words, the former interpretation of Sections 8(d) and 9(a) must be preferred.

To hold that the "contracting out" of work done by employees in the bargaining unit is a statutory subject of collective bargaining would not unreasonably interfere with industrial efficiency. The only conclusion which automatically follows from such a holding is that management and union must, under appropriate circumstances, bargain about any proposals upon the subject advanced by the other. Unilateral action would not automatically be rendered unfair. Whether management is required to bargain before letting a subcontract, and how extensive any required bargaining will have to be, will depend, in any given case, upon such circumstances as the terms of any collective bargaining agreement, any past practice establishing the *status quo,* the character of the subcontracting, any business exigencies, etc. The institutions of collective bargaining and the law defining the statutory duty to bargain collectively are both flexible enough to meet any urgent industrial needs. While management might sometimes find an absolute prerogative more consistent with its immediate interests, the "objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employ-

ment relationship" (*Wiley* v. *Livingston*, 376 U.S. 543, 549).

The decisions of this and other courts confirm the conclusion that "contracting out" is a subject of mandatory bargaining. *Order of Railroad Telegraphers* v. *Chicago & North Western Railway Co.*, 362 U.S. 330; *Local 24* v. *Oliver*, 358 U.S. 283.

II

In the circumstances of this case petitioner violated the duty to bargain collectively by substituting a labor contractor for all the employees in the bargaining unit without prior negotiation with the union. Unilateral action by an employer violates section 8(a)(5) if it is, in effect, a refusal to meet and negotiate with the employees' representatives about a statutory subject. That was the case here. Since the existing agreement had been reopened, it was a proper time for negotiations. Although the union made no request in advance of the contracting out, because it had no reason to suppose that action was imminent, petitioner cannot have had the slightest doubt about the union's desire to negotiate about a program abolishing the 50 jobs in the bargaining unit. Nor can it be seriously argued that the contract was let pursuant to an established procedure or because of a sudden emergency.

III

The Board did not exceed its remedial powers in directing petitioner to resume the maintenance operation, reinstate the employees with back pay, and bargain with the union. Section 10(c) empowers the

Board to require any person who has committed an unfair labor practice "to take such affirmative action * * * as will effectuate the policies of this Act." Restoration of the *status quo ante* tends to effectuate the policies of the Act by depriving the employer of advantage gained by the unfair labor practice and by assuring employees that, when they exercise their statutory rights and suffer in consequence, the law, despite delays in enforcement, will put them as nearly as possible in the same situation as if the law had been obeyed.

The Board went no farther in the present case. The order requires petitioner to restore the *status quo* as nearly as possible and then to bargain in good faith about contracting out the maintenance operation and any other statutory subjects, as it should have done in the beginning. Petitioner will have the same freedom as any other employer to formulate its bargaining position and to take unilateral action if no agreement is reached. The inconvenience and cost of resuming and carrying on, pending the bargaining, the maintenance operations now being performed by the labor contractor cannot be very great, because the work is being done in petitioner's plant, with its equipment and under its ultimate control. The burden, if any, was for the Board to weigh against the prejudice to the employees of leaving them to bargain as outsiders about petitioner's resumption of an operation which had been unlawfully transferred to the outside contractor.

The argument that the Board may not order reinstatement of employees with back pay is inconsistent

with the plain words of the statute and the substance of consistent administrative and judicial practice. The Board, with judicial approval, has consistently ordered reinstatement, discharging replacements if necessary, where an employer's refusal to bargain resulted in an unfair labor practice strike. Technically, violation of section 8(a)(3) may be involved in the refusal to rehire unfair labor practice strikers upon their request, but the substance of the matter is that the Board is restoring the *status quo ante* the violation of section 8(a)(5).

Since petitioner has failed to show that "the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act," the order should be enforced. *Virginia Electric Co.* v. *National Labor Relations Board*, 319 U.S. 533, 540.

ARGUMENT

Introductory

The present case impinges, in its broadest aspects, upon some of the most difficult and most important questions of labor-management relations. On the one hand lies the deep concern of employees with any management decision directly affecting the volume of work upon which their job security depends. On the other hand lies the equally vital interest of management in making and effectuating decisions concerning products, methods, equipment, scheduling, etc., that fall within its special competence by reason of its training and their relation to financial investment. Even narrowed to the subject matter more immediately involved—the "contracting out" of work of the kind done by employees in the bargaining

unit—the case is of concern to all industries which practice subcontracting.

For the foregoing reasons we have thought it advisable to present a more comprehensive discussion of the problem than required by the necessities of this particular case. In putting the problem in context, however, it is essential to define some of the terms and also to disentangle some related but fundamentally different questions.

1. The instant case is commonly said to raise the question whether "subcontracting" is a subject of mandatory bargaining under the National Labor Relations Act.[6] Unfortunately the term "subcontracting" has no precise meaning. It is sometimes used to describe a variety of business arrangements altogether different from that which forms the basis of the unfair labor practice charges in the present case.

One common form of subcontracting results from the arrangements in the building and construction industry whereby the general contractor who undertakes an over-all project (a dam, highway or office building) arranges for subcontractors to do specialized parts of the work with their own employees, typically electrical work, plumbing, painting, etc. In the construction industry subcontracting is standard

[6] See, *e.g.*, *Employer's Duty to Bargain About Subcontracting*, 64 Col. L. Rev. 294, 297–298, 305; *Labor Law Problems in Plant Relocation*, 77 Harv. L. Rev. 1100, 1103; Adams and Coleman, *Can Collective Bargaining Survive the Board?*, 52 Georgetown L.J. 366, 369–370; Burstein, *Subcontracting and Plant Removals*, 13 Lab. L.J. 405, 406–407; Freilicher, *Collective Bargaining and Contracting Out*, 23 Fed. Bar J. 332, 332–334. Cf. Farmer, *Good Faith Bargaining Over Subcontracting*, 51 Georgetown L.J. 558, 565.

procedure. Few prime contractors complete a large project exclusively with their own direct employees.

Essentially the same form of subcontracting is exemplified by a practice common in defense industries whereby the prime contractor for the government undertakes to do such work as building airplanes or producing a weapons system, but arranges to have thousands of parts and sub-assemblies manufactured by subcontractors. Here again the prime contractor often lacks the competence or facilities to fabricate the parts or complete the sub-assemblies—components for the electronic guidance system in a missile, for example—and it is contemplated from the beginning, or even required by the Department of Defense, that much of the work will be subcontracted to those qualified to complete it.

So far as we are aware neither employees nor labor unions have seriously sought to bargain about the subcontracting of work the physical performance of which is clearly outside the normal scope of the employer's business and which is therefore of a kind not performed by his employees. The disposition of the present case should have no appreciable effect upon those forms of subcontracting and such problems as may arise out of them may safely be left to the future.[7]

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[7] We do not mean to imply that all subcontracting in defense industries is distinguishable from the problems discussed in this brief. A substantial part of such subcontracting must involve work which is at least arguably of the kind that might be done by the employer's own employees. Much of the reasoning sustaining the decision below would be applicable to the contracting out of work in the latter category.

Of much greater concern in labor-management relations are the "subcontracts" of work which might be done on the employer's own machines and by his regular employees. Even within this classification, the term "subcontracting" applies to a variety of arrangements, and practices differ from industry to industry and even from employer to employer. For example, in the manufacture of textiles there is often need for making hand repairs of the imperfections in the cloth that comes from the looms. One mill may have its own repair room. Another may regularly "subcontract" all the repair work to one of the local establishments often found in textile communities specializing in making hand repairs to cloth woven on the looms of others. A third mill may follow an intermediate course, maintaining a repair room with enough employees to handle the normal flow of work but subcontracting in times of peak production.

Essentially the same form of subcontracting is practiced by metal fabricators and assemblers of specialized machine work made to contract specifications rather than for subsequent sale on the open market. Such firms normally have a variety of lathes, drill presses and other machine tools. At any given time various tools are at work in the completion of outstanding orders. If the manufacturer takes a new contract—say, a contract for large marine valves—the decision whether to manufacture all the parts or to machine some and subcontract others would turn upon the work already scheduled for the machines required, the availability of employees with the neces-

sary skills, the scheduling of other commitments, upon comparative costs and a host of related questions. Some businesses have to make frequently recurring decisions about this kind of subcontracting. Their effect upon the employees will vary according to the size of the contract and the volume of other work in the shop.

Still another form of subcontracting (as the term is sometimes loosely used) involves bringing into the principal employer's plant an outside contractor and his employees who are engaged to perform in the shop operations previously performed by the employer's own employees in the bargaining unit. For example, an automobile assembly plant which employed its own window washers might decide to contract the work out to an independent concern which specialized in window-washing and would do essentially the same work with its own employees in place of those in the bargaining unit.

The present case involves a form of subcontracting essentially similar to that last described. The case is peculiar because the maintenance employees in petitioner's plant were organized in bargaining units separate from the production workers; and petitioner contracted out all its maintenance work. The same kind of work is now being done in the same place and usually under the same ultimate direction as before. The "contracting out," viewed realistically, has had only three practical consequences: (i) New men do the work in place of the employees who had been doing it. (ii) The labor contractor supplies the supervision in place of petitioner's foremen. (iii) The wages and other terms of employment under which the work was

done have been changed and will hereafter be fixed by the labor contractor, perhaps in conjunction with the union representing his employees, instead of by collective bargaining between petitioner and the union representing his employees. The net result has been the total destruction of the bargaining unit as well as the substitution of a wholly new group of employees to do the work of those in the unit with some consequent savings to the petitioner.

In the present case, therefore, there is no need for the Court to determine whether proposals relating to other forms of "subcontracting" are statutory subjects of collective bargaining. It is only fair to point out, however, that the Board's rationale extends at least to all "contracting out" of work of the kind normally done by employees in the bargaining unit, either by bringing the subcontractor and his employees into the plant or by sending work out of the plant to the subcontractor. We shall use the term "contracting out" to describe this form of arrangement.

2. The mutual rights and duties of employers and labor unions with respect to any putative subject of collective bargaining depend upon two distinct lines of analysis. In the instant case, therefore, the ultimate determination of whether the employer has committed an unfair labor practice under section 8(a)(5) depends upon two distinct questions, only one of which is discussed in petitioner's brief.

The threshold question is whether the subject upon which the employer is alleged to have refused to bargain is one to which that statutory duty can ever attach. Under sections 8(a)(5), 8(d) and 9(a) the duty

extends to "rates of pay, wages, hours of employment, or other conditions of employment" (section 9(a)) or to "wages, hours, and other terms and conditions of employment" (section 8(d)). Since the duty extends to each and every subject embraced within the quoted phrases,[8] the initial question is always whether the putative subject of bargaining—here the contracting out of plant maintenance work previously performed by employees in the bargaining unit—comes within the phrases "conditions of employment" or "terms and conditions of employment" within the meaning of sections 8(d) and 9(a). In Point I we state the reasons for an affirmative answer in respect to "contracting out."

The second, separable question is what does the duty to bargain require of the employer or the union, in given circumstances, with respect to the particular statutory subject of collective bargaining. A holding that "contracting out" is a statutory subject of collective bargaining leads automatically to the conclusion that sections 8(a)(5) and 8(b)(3) require the employer and the union each to negotiate about any proposal upon the subject advanced by the other under appropriate circumstances, but no further conclusion can be drawn without examining the scope and meaning of the statutory duty to bargain about the particular subject in the particular context. Thus, many of the conse-

[8] *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (C.A. 7), certiorari denied on this point, 336 U.S. 960; *National Labor Relations Board* v. *J. H. Allison & Co.*, 165 F. 2d 766 (C.A. 6), certiorari denied, 335 U.S. 814; *Richfield Oil Corp.* v. *National Labor Relations Board*, 231 F. 2d 717 (C.A.D.C.), certiorari denied, 351 U.S. 909.

quences of holding that "contracting out' is a statutory subject of collective bargaining turn upon open questions concerning the application of sections 8(a)(5) and 8(b)(3).

Specifically, it is wrong to assume that if contracting out is a subject of mandatory collective bargaining, it is *per se* an unfair labor practice for an employer to let such a contract without consulting the union. An employer is free to bargain for the union's contractual assent to its contracting out work during the term of a proposed collective bargaining agreement and, if such a clause is negotiated, the employer may take unilateral action without consulting the union (see pp. 45–46 below). Even in the absence of a collective agreement, such circumstances as the nature of the employer's business, the character of the particular subcontract, the employer's expressed willingness to discuss the subject before letting further subcontracts, and an established custom treating recurrent subcontracting as a management function might well lead to a ruling that the unilateral letting of a particular subcontract was not an unfair labor practice under section 8(a)(5) (see pp. 48–49 below). None of this Court's decisions suggests that the Act forbids all unilateral action on all statutory subjects of bargaining. See *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 746.

In the present case the principles governing an employer's right to take unilateral action are material chiefly as they make up part of the legal context in which the Court must decide the central question whether proposals concerning the contracting out of

work in the bargaining unit are statutory subjects of collective bargaining. Petitioner apparently concedes that, if contracting out is a statutory subject of bargaining, the unilateral action on its part would violate section 8(a)(5). We believe that the concession is well-founded for the reasons stated in Point II.

I

CONTRACTING OUT MAINTENANCE WORK OF THE KIND DONE BY EMPLOYEES IN THE BARGAINING UNIT IS A STATUTORY SUBJECT OF BARGAINING

A. THE PLAIN MEANING OF THE WORDS "TERMS AND CONDITIONS OF EMPLOYMENT" SHOWS THAT "CONTRACTING OUT" IS A STATUTORY SUBJECT OF COLLECTIVE BARGAINING.

Section 8(a)(5) of the National Labor Relations Act declares it an unfair labor practice for an employer—

> to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 9(a), which was part of the original Wagner Act, provides that the representatives designated by the majority shall be the exclusive representatives—

> for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

Section 8(d), added in 1947 by the Taft-Hartley amendments, provides:

> * * * to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with

> respect to wages, hours, and other terms and conditions of employment * * *.

The phrases "conditions of employment" and "terms and conditions of employment" were used in their broadest sense. In 1947 Congress considered and rejected proposals of narrower words, which were offered in an effort to curtail the scope of labor-management negotiations.[9] In its ordinary meaning the word "terms" means (Webster's International Dictionary, 2d ed.):

> Propositions, limitations, or provisions, stated or offered, as in contracts, for the acceptance of another and determining the nature and scope of the agreement.

The word "conditions" is even broader. It is defined as (*ibid.*):

> Something established or agreed upon as a requisite to the doing or taking effect of something else; a stipulation or provision.

Thus, the "terms and conditions of employment" to which sections 8(d) and 9(a) refer are any stipulations under which the workers agree to be employed,

[9] H.R. 3020, 80th Cong., 1st Sess., Sec. 2(11), 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), 163, 167; House Report No. 245, 80th Cong., 1st Sess., 22–23, 1 Leg. Hist. 313–314. The change was opposed on the ground, *inter alia*, that it would make nonmandatory a number of subjects, including subcontracting, which were "traditionally the subject matter of collective bargaining in some industries or in certain regions of the country." House Minority Report No. 245, 80th Cong., 1st Sess., 71, 1 Leg. Hist. 362. The Senate resisted the proposed change, and the Wagner Act definition of bargaining subjects was left unchanged. See 93 Cong. Rec. 6443, 2 Leg. Hist. 1539.

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and the management to employ them. Except as other language or the policy of the Act may confine the meaning, they verbally embrace any provision which either party wishes to put in the agreement.

It may be objected that the literal reading would give labor unions a statutory right to bargain about a host of subjects heretofore regarded as "management prerogatives," including prices, types of product, volume of production, and even methods of financing. Such is doubtless the logical, theoretical consequence of giving effect to the literal sweep of words, although the Board has never gone so far.[10] As a practical matter, however, the scope of collective

[10] The Board with court approval has found that certain subjects lie outside the area of mandatory bargaining, although they are nonetheless permissible subjects of bargaining. In addition to *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, see: *National Labor Relations Board* v. *Davison*, 318 F. 2d 550, 555–557 (C.A. 4) (proposal that union indemnifying employer for losses resulting from retaliatory action by other unions); *Local 164, Painters* v. *National Labor Relations Board*, 293 F. 2d 133 (C.A.D.C.), certiorari denied, 368 U.S. 824 (proposal that employer post performance bond); *Jasper Blackburn Products Corp.*, 21 NLRB 1240, 1254–1256 (proposal that union post a performance bond); *National Labor Relations Board* v. *Dalton Telephone Co.*, 187 F. 2d 811, 812 (C.A. 5), certiorari denied, 342 U.S. 824 (proposal that union make itself amenable to suit in State courts); *Douds* v. *I.L.A.*, 147 F. Supp. 103, 111–112 (S.D. N.Y.), affirmed, 241 F. 2d 278, 282 (C.A. 2) (insistence on bargaining for employees outside the certified unit); *National Labor Relations Board* v. *Floor Decorators*, 317 F. 2d 269 (C.A. 6) (proposal that employer make contributions to an industry promotion fund); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 320 F. 2d 615, 618–619 (C.A. 3), certiorari denied, 375 U.S. 984 (proposal that grievances be signed by individual employees).

bargaining is confined by the range of the employees' vital interests. Proposals concerning subcontracting are important subjects of collective bargaining in many industries because subcontracting is of intense concern to the workers. Every time management arranges to buy parts or otherwise subcontract work of the kind usually done by the company's own employees, fear among the employees' for their income and employment security is generated by the danger that the "subcontract" will reduce the amount of work available to them. The threat is the greater and the more immediate when the contract brings men from another firm into the plant to take over the jobs of the employer's own workers. The fear is reflected in collective bargaining practice and arbitration (see pp. 28–36 below). No legal formula confining the interpretation of "terms and conditions of employment" can eliminate the workers' intense concern. The only question, therefore, is whether the problems shall be resolved within the framework of collective bargaining established by national policy or left outside to fester without negotiation and then to break out in economic warfare (see pp. 37–42 below). The same is equally true of any other subject which becomes of such pressing importance to employees as to lead them to interject it into collective bargaining. To give the words "terms and conditions of employment" the full scope of their natural meaning, so as to include any stipulation which either party considers so vital as to wish to make it part of the bargain, gives effect to the basic policy of requiring the interchange of viewpoints and information in the hope

that mutual understanding may lead to an accommodation where there might otherwise be strife.[11]

In the present case, however, it is unnecessary to delimit the full list of the statutory subjects of collective bargaining. In the first place, contracting out work done by employees in the bargaining unit directly and immediately affects the volume of work available and therefore determines whether the employees in the unit will continue to be employed. When petitioner contracted out its maintenance work, it thereby terminated the employment of more than 70 employees, including all of the 50 workers in the unit

[11] On page 16 of its brief petitioner quotes at length from an address delivered in 1956 by Mr. Justice Goldberg, then General Counsel to the United Steelworkers. 7 Proceedings of the National Academy of Arbitrators 118. The address very plainly did not express his "understanding of what was, and what was not, embraced by the statutory phrase, 'wages, hours and other terms and conditions of employment'" (Pet. Br. p. 16). First, the speaker was addressing himself solely to the question, what are management's reserved rights *under a collective bargaining agreement*. There is no reference to the statute and the most casual reading of the address is enough to make the limitation apparent.

Second, nothing in the address deals with contracting out work in the bargaining unit.

Third, the theme of the address, as we understand it, is that management can win respect for its "rights" only if it recognizes the right of labor to be heard when labor's "rights" are affected. When the issue is the installation of a new product or method of manufacturing, the initiation of the measure and the resulting effects upon wages and working conditions may be separable. The decision to contract out work in the bargaining unit often is inseparable, however, from the laying off of the employees who were doing it. Applying the theme of the address, this would seem to be a step involving "the rights of labor."

represented by the charging union. It would be entirely accurate to say that petitioner dismissed all its maintenance employees without prior negotiation. The two aspects of the step taken are as inseparable as the faces of a coin. Second, the Board was not extending collective bargaining into a novel field. "Subcontracting" has been widely accepted as a subject of collective bargaining because the realities of industrial life often make it an issue of no less direct concern to workers than to management (see pp. 28–36 below). These characteristics distinguish contracting out from other claimed "management prerogatives" upon which a union might theoretically seek to bargain.

Other matters directly involving tenure of employment have long been held within sections 8(d) and 9(a). Lay-offs and recalls,[12] seniority[13] and compulsory retirement[14] are all subjects of mandatory bar-

[12] *National Labor Relations Board* v. *Westinghouse Air Brake Co.*, 120 F. 2d 1004, 1006 (C.A. 3); *Southern Coach & Body Co.*, 141 NLRB 80, 81–82; *Stilley Plywood Co.*, 94 NLRB 932, 969, enforced *per curiam* on this point, 199 F. 2d 319 (C.A. 4), certiorari denied, 344 U.S. 933; *Eva-Ray Dress Mfg. Co.*, 88 NLRB 361, 362, enforced *per curiam*, 191 F. 2d 850 (C.A. 5); *West Boylston Mfg. Co.*, 87 NLRB 808, 811; *Hagy, Harrington & Marsh*, 74 NLRB 1455, 1456, 1470.

[13] *National Labor Relations Board* v. *Westinghouse Air Brake Co., op. cit., supra; National Labor Relations Board* v. *Century Cement Co.*, 208 F. 2d 84, 85–86 (C.A. 2); *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247, 252–253 (C.A. 7), certiorari denied on this point, 336 U.S. 960; *The Hughes Tool Co.*, 100 NLRB 208, 209, n. 4.

[14] *Inland Steel Co.* v. *National Labor Relations Board, op. cit., supra; Allied Mills, Inc.*, 82 NLRB 854, n. 2, 862.

gaining; so are disciplinary discharges,[15] the union shop [16] and the hiring hall.[17]

Similar demands directly involving the amount of work available in a bargaining unit have also been treated, both in law and in practice, as involving terms and conditions of employment. Controversies over work assignments resulting in inter-union "jurisdictional disputes" are disputes over "terms or conditions of employment," and the employer has a duty to bargain over the assignment.[18] Technological changes displacing workers with machines fall in the same categories.[19] Neither can be fairly distinguished from "contracting out" in their effect upon the employees.

Nor can the "contracting out" involved in this case be excluded from sections 8(d) and 9(a) upon the ground that the step dealt with matters often left to managerial determination, such as what parts to fabricate and what to buy, what machines to install, what

[15] *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 360; *National Labor Relations Board* v. *Bachelder*, 120 F. 2d 574, 577 (C.A. 7).

[16] *National Labor Relations Board* v. *Andrew Jergens Co.*, 175 F. 2d 130, 133 (C.A. 9), certiorari denied, 338 U.S. 827; *Owens-Illinois Glass Co.* v. *National Labor Relations Board*, 176 F. 2d 172, 177 (C.A. 7); *Phelps Dodge Copper Products Corp.*, 96 NLRB 982, 989, and cases there cited. See, also, *National Labor Relations Board* v. *General Motors Corp.*, 373 U.S. 734.

[17] *Houston Chapter, Associated General Contractors of America*, 143 NLRB No. 43, June 28, 1963, 53 LRRM 1299.

[18] See *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 264–267; *National Labor Relations Board* v. *Radio and Television Broadcast Engineers, Local 1212*, 364 U.S. 573, 576–577, and cases there cited.

[19] *Renton News Record*, 136 NLRB 1294, discussed, n. 47, pp. 69–70, *infra*.

funds to invest in plant equipment rather than inventories, how to schedule the work, *et cetera*. While we think that such considerations properly come into play during the course of bargaining rather than in statutory interpretation,[20] they are largely irrelevant in the present case. The plant maintenance would have to be done in any event. It would be done in the plant. It would be directed, even scheduled, by petitioner. No capital investment was at stake, nor anything that could be said to affect the scope or character of the petitioner's business. With this kind of contracting out the whole weight of the problem, from the standpoint of management as well as labor, is on the questions, who will work and who will determine wages, hours and working conditions. Nothing of practical importance is involved in the area conventionally left to managerial decisions.[20a]

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[20] See Cox and Dunlop, *Regulation of Collective Bargaining by The National Labor Relations Board*, 63 Harv. L. Rev. 389, 401–405.

[20a] In this light, there is no substance to petitioner's contention (Br. 37–39) that it is meaningless to require bargaining about subcontracting because, by hypothesis, the services of the employees who would be bargaining are unwanted by the employer. Petitioner continues to require maintenance services, and the only question is whether those services are to be performed by its own employees or by the employees of another employer. As shown (pp. 40–41, below), it is not unlikely that the present employees and their representative would be able, if the subject were placed on the bargaining table, to work out an arrangement under which those employees could continue to perform the maintenance services.

B. THE ESTABLISHED PRACTICE IN COLLECTIVE BARGAINING SHOWS THAT STIPULATIONS CONCERNING "CONTRACTING OUT" ARE "TERMS AND CONDITIONS OF EMPLOYMENT"

The term "bargain collectively" as used in the National Labor Relations Act "has been considered to absorb and give statutory approval to the philosophy of [collective] bargaining as worked out in the labor movement in the United States" (*Telegraphers* v. *Railway Express Agency,* 321 U.S. 342, 346, quoted with approval in *National Labor Relations Board* v. *American National Insurance Co.,* 343 U.S. 395, 408). The same approach should be followed in particularizing the topics which sections 8(d) and 9(a) make subjects of mandatory collective bargaining. Industrial experience is the best test both of the depth of the workers' interest in managerial practices affecting them and also of their amenability to labor-management negotiations. "[T]he needs of the industrial world can be determined most accurately by examining the arrangements which management and labor have worked out through negotiation, trial and error. This is not a situation in which solutions satisfactory to the industry concerned may be detrimental to the rest of the community. If capital and labor are able to adjust questions concerning the allocation of responsibilities to their mutual satisfaction, society will gain nothing by imposing different answers" (Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board,* 63 Harv. L. Rev. 389, 405–406).

Experience shows that subcontracting has been brought, both widely and successfully, within the framework of collective bargaining under the National Labor Relations Act. Many parties to collective bargaining relationships have long recognized that a contractual limitation on the employer's right to "contract out" may be essential to protect the negotiated job standards, as well as to safeguard the jobs of employees in the bargaining unit.[21] A study of 1,687 major collective bargaining contracts in effect at the beginning of 1959 shows that there were 378 with express limitations on contracting out work that might otherwise be available to employees in the bargaining unit.[22] The silence of the others is ambiguous for the arbitration cases cited below show that "subcontracting" is often a subject of collective bargaining even though no term of the labor agreement mentions it expressly.

The bulk of agreements that limit contracting out place only partial restrictions on the practice, but there is wide diversity in the arrangements negotiated

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[21] See Slichter, *et al.*, *The Impact of Collective Bargaining on Management*, pp. 284–285, 290–291 (Brookings Institution, 1960); Slichter, *Union Policies and Industrial Management*, pp. 291, 299–300, 437–441 (Brookings Institution, 1941); Lunden, *Subcontracting Clauses in Major Contracts*, 84 Monthly *Lab. Rev.* 579, 715; *Subcontracting Clauses in Major Collective Bargaining Agreements*, pp. 1-2, 9 (Bur. Lab Stat., Bull. No. 1304, 1961). See, also, Chandler, *Management Rights and Union Interests*, pp. 90–91, 240–241 (McGraw-Hill, 1964).

[22] *Subcontracting Clauses in Major Collective Bargaining Agreements*, p. 3 (Bur. Lab. Stat., Bull. No. 1304, 1961).

by the parties to meet their own particular needs. In some cases, an attempt is made in advance to specify the situations in which the contracting of work will be permissible. For example, the contract may authorize the employer to subcontract if he does not have the necessary equipment or skilled workers for the job; if the work is of a temporary nature or of a type not customarily performed by unit employees; if an "emergency" situation is presented; or if the employer cannot otherwise meet his orders during peak periods. On the other hand, the contract may preclude contracting out if unit employees are, or are about to be, placed on layoff; if the subcontractor is not under contract with the union; or if he does not adhere to the contract wage and other standards.[24]

[24] Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 413–414; Lunden, *Subcontracting Clauses in Major Contracts*, 84 Monthly Lab. Rev. 579, 583, 585, 715, 717, 718, 719–722; *Subcontracting Clauses in Major Collective Bargaining Agreements*, pp. 5, 7, 10, 11, 13–16, 20–22, 25, 26, 31, 33 (Bur. Lab. Stat., Bull. No. 1304, 1961); *Collective Bargaining Provisions, Union and Management Functions, Rights and Responsibilities*, pp. 21–22, 22–23, 25, 26, 27–28 (Bur. Lab. Stat. Bull. No. 908–912, 1949); Slichter, *et al., The Impact of Collective Bargaining on Management*, pp. 299–306 (Brookings Institution, 1960); BNA, 2 *Collective Bargaining Negotiations and Contracts*, 65:181–183. See, also, CCH, *Labor Law Reporter, Union Contracts—Arbitration*, par. 59, 911.55, p. 85, 365 (Art. XXI); par. 59, 917.012, p. 85, 706 (Sec. 3); par. 59, 944.116, p. 86, 936 (Art. XLVII).

We do not here consider the question of the extent to which some of these clauses may now be illegal in view of the enactment in 1959 of section 8(e) (29 U.S.C. 158(e)). The *amicus curiae* brief filed by the National Association of Manufacturers is quite unsound, however, in arguing that all clauses restricting subcontracting are barred by section 8(e) (pp. 3–11). A distinction must be drawn between a subcontracting clause

In other cases, no attempt is made to specify the substantive conditions under which work may be contracted out; instead, the collective bargaining agreement establishes the procedures through which the decision on subcontracting is to be reached as each case arises. Thus, the agreement may provide for a specified period of advance notice to the union and an opportunity to be heard on proposed subcontracts; for union-management consultations about subcontracting; or, in rare instances, for unilateral employer action and union veto power.[25]

Express agreements of the parties limiting the right to contract out have been upheld by arbitrators and courts, in view of the legitimate employee and union interests served by such contractual limitations.[26]

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aimed at protecting the job opportunities of employees in the bargaining unit and one whose thrust is at union representation or conditions of employment among the employees of another employer; the former is "primary" and outside the purview of Section 8(e). See *Meat and Highway Drivers* v. *National Labor Relations Board*, 56 LRRM 2570 (C.A.D.C.) June 25, 1964. See, also, Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086, 1118–1119.

[25] BNA, 2 *Collective Bargaining Negotiations and Contracts*, 65: 184–185; Cox and Dunlop, *Regulation of Collective Bargaining, etc.*, 63 Harv. L. Rev. 389, 414–415; Lunden, *Subcontracting Clauses in Major Contracts*, 84 Monthly Lab. Rev. 579, 583–584, 715, 718; *Subcontracting Clauses in Major Collective Bargaining Agreements*, pp. 5–6, 14, 20, 22, 25, 31 (Bur. Lab. Stat., Bull. No. 1304, 1961); *Collective Bargaining Provisions, etc.*, pp. 20–21, 22, 27–28 (Bur. Lab. Stat., Bull. No 908–12, 1949); Slichter, *et al.*, *The Impact of Collective Bargaining on Management*, pp. 294–299, 306–307 (Brookings Institution, 1960).

[26] See *Mencher* v. *B. Geller & Sons*, 96 N.Y.S. 2d 13, 19, 276 App. Div. 556: "The 'no-contracting' provisions * * * have been incorporated in the collective labor agreements in this industry

The propriety and wisdom of including stipulations concerning subcontracting among the terms and conditions of employment in appropriate cases was recognized as early as World War II by the War Labor Board, which repeatedly recommended, and sometimes even directed, the execution of agreements limiting the contracting out of work normally done in the bargaining unit, in order to protect wage scales, working conditions, seniority rights and job security. See, *e.g. Associated Fur Coat and Trimming Manufacturers, Inc.*, 19 War Lab. Rep. 835, 847; *Dixie Manufacturing Co.*, 27 War Lab. Rep. 396, 397, 403; *Underwood Elliott Fisher Co.* 3 War Lab. Rep. 476, 480; *National Association of Glove Manufacturers for Fulton County, New York*, 4 War Lab. Rep. 307, 313–314; *Kuehne Chemical Co.*, 23 War Lab. Rep. 294, 296. Similarly, at least one Presidential Emergency Board appointed under the Railway Labor Act recommended that the contract resolving the labor dispute should include a restriction upon "subcontracting" because the unqualified right of management to contract out work of the bargaining unit—

> would render the contract illusory; make it a mere "will, wish, or want" contract—or no con-

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[the fur industry] since 1928 and have been enforced. They pertain to matters in which the union and its membership have a direct economic interest and are essentially for the benefit of the union and its members and for the maintenance and preservation of concededly desirable standards and working conditions in the industry." See also *Maisel* v. *Sigman*, 123 Misc. 714, 205 N.Y.S. 807, 815–817 (N.Y. Sup. Ct.); *Selb Mfg. Co.* v. *I.A.M.*, 50 LRRM 2671, 2672 (C.A. 8); *In re Jasper*, 33 LA 332 (N.Y. Sup. Ct.); *Chupka* v. *Lorens-Schneider Co., Inc.*, 51 LRRM 2376 (N.Y. Ct. App.).

> tract at all; it would be merely an option under such a provision. The company could remove from the coverage of the contract any work it saw fit at any time and, of course, if the company could do that, it could, in effect, remove all the work [*Northwest Airlines, Inc.*, 5 LA 71, 81].

Even in the absence of specific mention in the contract, arbitral and judicial decisions have brought "subcontracting" within the framework of the collective bargaining relationship. Numerous experienced arbitrators have held that limitations upon some forms of "subcontracting" are implicit in "the very nature of a collective bargaining agreement" (*Kennecott Copper Corp. & International Brotherhood of Electrical Workers*, 34 LA 763), or in the express provisions of the particular contract.[27] Such a limitation

[27] The various factors considered by arbitrators in determining whether a particular instance of subcontracting violates an implied contract limitation are similar to the conditions written into express subcontracting limitations by the parties to the contract—*e.g.*, whether unit employees have been put or kept on layoff as a result of the subcontract, whether the subcontract is only temporary or to cover an emergency situation, whether the work involved is like that customarily performed by unit employees, whether the subcontracting is economically "necessary" because the employer lacks the specialized equipment or trained personnel for the job, whether the work subcontracted is calculated substantially to dissipate the unit, undercut the union, or evade the provisions of the contract. See *A. D. Juilliard Co., Inc.* 21 LA 713, 724; *U.S. Potash Co.*, 37 LA 442; *Temco Aircraft Corp.*, 27 LA 233, 235; *Thompson Grinder Co.*, 27 LA 671, 673; *Electric Auto-Lite Co.*, 30 LA 449. See, also, the remarks of G. Allan Dash, Jr., in *Cornell Off-Campus Conference on the Arbitration of Two "Management Rights" Issues; Work Assignments and Contracting Out*, pp. 78–80 (N.Y. State, School of Ind. & Lab. Rel., 1960); Crawford, "The Arbitration

has been inferred from the clause granting recognition to the union as collective bargaining representative of the employees on the theory that, if the employer could unilaterally withdraw substantial amounts of work from the unit, he would have it in his power to subvert the wage and overtime provisions of the agreement or the job classification, seniority, and discharge clauses. This position was expressed in *Bridgeport Brass Co.*, 25 LA 151, 156:

> As the Union rightly contends there is involved in this dispute an issue as basic as the Contract itself. The fundamental purpose of the Agreement is to recognize mutual rights and duties, and from the point of view of the Union to establish job security and satisfactory conditions of work. The Recognition clause * * * establishes the rights of the Union as bargaining agent "with respect to rates of pay, wages, hours of employment and other conditions of employment," and if these rights can be ignored and the Company assumes the authority of unilateral action in [such matters], then no provision of the agreement has any stability.[28]

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of Disputes Over Subcontracting," in *Challenges to Arbitration*, National Academy of Arbitrators, 30th Ann. Meeting, p. 65 (BNA, 1960).

[28] Note also the following:

(1) *Celanese Corp. of America*, 14 LA 31, 35: "It is well recognized that one of the purposes of a collective bargaining agreement, and particularly the seniority provisions contained in the existing Agreement, is to assure employees within the bargaining unit some measure of job security, but to allow what the Company here did would in no time make meaningless and of no value these provisions of the Agreement which may not be the subject of unilateral change during its term."

(2) *Thompson Grinder Co.*, 27 LA 671, 674: "If the Com-

On the same basis, arbitrators have rejected the contention that a general management rights clause automatically gives the employer the right to contract out at will work done by employees in the bargaining unit. See, *e.g.*, *Gulf Oil Corp.*, 33 LA 852, 855. See also *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 391* v. *Webster Electric Co.*, 299 F. 2d 195 (C.A. 7); *District Lodge No. 1, International Association of Machinists, AFL–CIO* v. *Crown Cork and Seal Co., Inc.*, 47 LRRM 2615 (E.D. Pa.); *International Union of Electrical Workers* v. *General Electric Co.*, 56 LRRM 2289 (C.A. 2), May 26, 1964, petition for certiorari filed, No. 413, this Term.

Other arbitrators have reached the contrary conclusion upon the facts before them, holding that, in the absence of an express limitation upon management's freedom to subcontract, none would be im-

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pany could thus abolish the labor force, it could, one by one, or group by group, abolish all classifications and rates of pay, and in effect nullify the entire agreement by the simple device of employing contractors."

(3) *Journal Publishing Co.*, 22 LA 108, 112: "Union status and the stability of the bargaining unit are the very foundation of the bargaining relationship."

See, in addition, *Pacific Laundry & Dry Cleaning Co.*, 39 LA 676, 684; *U.S. Potash Co.*, 37 LA 442, 446–448; *Mead Paper Corp.*, 37 LA 342; *Container Corp. of America*, 37 LA 252, 253; *Vulcan Rivet & Bolt Corp.*, 36 LA 871, 872. *Electric Auto-Lite Co.*, 30 LA 449, 454–455; *A. D. Juilliard Co., Inc.*, 21 LA 713, 724; *Hearst Consolidated Publications & Newspaper Guild*, 26 LA 723, 726; *Stockholders Publishing Co.*, 16 LA 644, 649–650.

plied from the recognition or seniority clauses or other conventional provisions.[29]

It is immaterial whether the cases can be reconciled by reference to the particular contracts or to the particular types of subcontracting. Nor is there need to determine which view should be preferred. The important point for present purposes is that the problems of contracting out are constantly being resolved within the framework of collective agreements and grievance arbitration. As this Court said in holding that the lower courts had erred in refusing to refer a similar dispute to arbitration under the arbitration clause of the applicable collective agreement (*United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584):

> Contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators.[30]

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[29] *Black-Clawson Co.*, 34 LA 215, 218, 220–221; *Wisconsin Natural Gas Co.*, 31 LA 880, 885; *Bethlehem Steel Co.*, 30 LA 678, 682, note and cases there cited.

[30] The Court quoted (363 U.S. at 584, n. 8) from *Celanese Corp. of America*, 33 LA 925, 941, where the arbitrator in a grievance over contracting out of work said:

"In my research I have located 64 published decisions which have been concerned with this issue covering a wide range of factual situations but all of them with the common characteristic—i.e., the contracting-out of work involved occurred under an Agreement that contained no provision that specifically mentioned contracting-out of work."

A concurring opinion (joined by three members of the Court) pointed out that the reason why the courts should be slow to find that the contract does not cover the subject of contracting out is that the consequence of the contrary conclusion is that the employer "was free completely to destroy the collective bargaining agreement by contracting out all the work." 363 U.S. 569 (footnote), 572.

C. THE PURPOSES OF THE NATIONAL LABOR RELATIONS ACT WILL BE ADVANCED BY TREATING "CONTRACTING OUT" AS A STATUTORY SUBJECT OF COLLECTIVE BARGAINING

The pressing interest of employees in "contracting out" and similar practices that threaten their job security is evident from the collective bargaining agreements and arbitration proceedings just discussed. Many observers believe that in the current economic milieu employees are more concerned about job security than wages and hours or union status. The pace of economic and technological change has riveted employers' attention upon practices affecting the volume of work available to their employees. "One of the most inflammatory issues in labor-management relations today is the growing management practice of 'subcontracting out'." *Inside vs. Outside,* 65 Fortune 215 (May 1962). See also Slichter, *et al., The Impact of Collective Bargaining on Management,* p. 289 (Brookings Institution, 1960); *Chandler, Management Rights and Union Interests,* pp. 7, 225 (McGraw-Hill, 1964). Under such conditions, one can be sure that employees not only will remain concerned about "subcontracting" but will use their economic strength, when driven to extremes, to protect their economic interests.

The issue before the Court, therefore, is not whether contracting out and other measures reducing the volume of work available to employees will be an issue between management and labor, nor whether unions may make such subcontracting the subject of collective action. The affirmative answers to those questions are established facts, which the interpretation of the statute cannot affect more than peripherally.

What the Court's interpretation of sections 8(d) and 9(a) will determine, is whether the problems will be resolved within or without the statutory framework. In industries in which collective bargaining is an established way of life, there will be collective bargaining about subcontracting whenever it touches the vital interests of employees regardless of how sections 8(d) and 9(a) are interpreted. There the chief effect will be to determine whether the statutory procedure must be followed or the bargaining is to be left at large. Where the employer has never wholeheartedly accepted collective bargaining and where he feels economically strong enough to assert a management prerogative without consulting the employees or their labor union, the rule established by the Court will determine whether the problem is to be subject to the creative and mediatory influence of joint discussion or left outside the Act to fester and perhaps break out in economic conflict.[31] Nothing in the statute denies the employees the right, where subcontracting is not covered by the contract, to resort to economic weapons against subcontracts which they oppose.

A statute must be interpreted to give effect to its purposes. A prime purpose of the National Labor Relations Act was to encourage the settlement of po-

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[31] Compare Fleming, "The Obligation to Bargain in Good Faith" in Shister, *Public Policy and Collective Bargaining*, pp. 72–73 (Harper and Row, 1962):

"If bargaining demands having to do with job security are not within the mandatory bargaining area of 'wages, hours, and terms and conditions of employment,' the net result will be that one of the most important bargaining problems of the period will be outside the main stream of the very legislation which was designed to encourage collective bargaining * * *."

tential industrial disputes by the process of negotiation between employers and the representatives of employees. The sponsors believed that collective bargaining would enable employers and employees to dig behind their prejudices and exchange their views with the result that agreement would be reached on many issues and the area of disagreement would be narrowed on others to the point where compromise was cheaper than battle. As this Court said in *National Labor Relations Board* v. *Jones and Laughlin Corp.*, 301 U.S. 1, 42, "Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances." As early as 1902 an industrial commission report noted—

> The chief advantage which comes from the practice of periodically determining the conditions of labor by collective bargaining directly between employers and employees is, that thereby each side obtains a better understanding of the actual state of the industry, of the conditions which confront the other side, and of the motives which influence it. Most strikes and lockouts would not occur if each party understood exactly the position of the other.[32] * * *

Initially it may be only fear of the economic consequences of disagreement that turns the parties to facts, reason, a sense of responsibility, a responsiveness to government and public opinion, and moral principle; but in time those forces generate their own

[32] H.R. Doc. No. 380, 57th Cong., 1st Sess., 844 (1902).

compulsions and collective negotiations approach the ideal of informed persuasion.

To hold that contracting out is a subject of mandatory bargaining would effectuate the purpose of the Act to bring critical subjects of controversy between labor and management within the mediatory influence of negotiations. It would be foolish to suppose that collective bargaining can serve no useful purpose in respect to the various forms of subcontracting. Stickier issues have yielded to the process. The collective bargaining agreements cited above show that management and labor have bargained about the subject successfully in many different industries. The contracts exhibit a wide variety of potential solutions to any particular dispute. Arbitrators have also drawn distinctions and proposed solutions appropriate to the particular plant.

There are many solutions even to the question whether particular work shall be contracted out, as in the present case. Petitioner's fundamental problem apparently was the cost of its maintenance work. Fluor, which agreed to serve as labor contractor, asserted that it could perform the maintenance work more economically than petitioner by reducing the work force from 75 to 60 men, by cutting fringe benefits and overtime payments, and by pre-planning and scheduling the services to be performed (R. 149–150). There is some reason to believe that the differences in cost estimates were partly attributable to the previous unwillingness of employees in the bargaining unit to "work out of classification" (*e.g.*, for a machinist, when not using that skill, to do other

work). Confronted with a choice between losing their jobs and increasing their productivity the employees might have agreed to cooperate in finding ways of meeting the problem of costs. Undoubtedly several approaches were available. One was suggested by the court of appeals (R. 177)—

> [T]he union, after hearing management's side of the problem, might concede the justice of the claims and agree to invoke union discipline to increase productivity and reduce costs. Specifically, it might offer a six months trial period in which either productivity would be increased with the existing force of * * * men or maintained with a reduced force to effect the economies desired by management.[33]

No one can say whether a mutually satisfactory solution would have been found in this case or will be found in any other, but the national labor policy is founded upon the Congressional conclusion that the chances are good enough to warrant subjecting such

[33] As the Court noted, in holding that the employer was obligated to furnish information in support of a claim of inability to pay increased wages: "Claims for increased wages have sometimes been abandoned because of an employer's unsatisfactory business condition; employees have even voted to accept wage decreases because of such conditions." *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152, and materials cited in n. 5. And see *Wall Street Journal*, June 10, 1964 (a local of the United Auto Workers agreed to invest in the plant, to take a pay cut, and change production standards in order to keep the Divco-Wayne Corp. from moving its bus-making operations south); *Wall Street Journal*, August 13, 1964 (two locals of the United Steelworkers agreed to accept a wage cut at Blaw-Knox Co.'s steel fabricating plant in order to keep the company from transferring operations to other plants).

issues to the process of collective negotiation. A holding that the subcontracting of work of the kind done by employees in the bargaining unit is a statutory subject of collective bargaining would advance a fundamental purpose of the National Labor Relations Act. The purpose would be truncated by a contrary interpretation.

D. TO HOLD THAT "CONTRACTING OUT" OF WORK DONE BY EMPLOYEES IN THE BARGAINING UNIT IS A STATUTORY SUBJECT OF COLLECTIVE BARGAINING WOULD NOT UNREASONABLY INTERFERE WITH INDUSTRIAL EFFICIENCY

The chief argument often raised against holding that contracting out is a subject of mandatory bargaining is that it would unduly hamper the management of industrial enterprises in putting into effect promptly decisions essential to greater efficiency and increased productivity.[34] In evaluating that argument, it is essential first to note the legal consequences of holding that the contracting out of work of the kind done by employees in the bargaining unit is within the scope of sections 8(d) and 9(a).

First. Such a holding would not put any automatic restriction upon the employer's freedom of action. His obligations arise from section 8(a)(5), as the union's duties arise from section 8(b)(3). If, as we submit, contracting out is a subject which sections 8(d) and 9(a) make bargainable, sections 8(a)(5)

[34] Petitioner does not raise the above contention, perhaps because there is no factual foundation for it in the present case. The contention is raised, however, in the Amicus Briefs (see Brief of Electronic Industries Assoc. 5–11; Brief of Chamber of Commerce 4–8; Brief of National Assoc. of Mfrs. 14–17).

and 8(d) impose upon the employer the duty, under some circumstances, to negotiate with the bargaining representative about any terms and conditions relating to contracting out which the union wishes to propose. Similarly, the representative must negotiate in good faith about any terms and conditions that the employer wishes to propose.

Those obligations arise when the employer and union are negotiating a new collective agreement. That is the only conclusion, however, that follows automatically upon a holding that contracting out is a subject of mandatory negotiation.

Second. The conclusion that "contracting out" is a subject of bargaining comprehended within sections 8(d) and 9(a) does *not* automatically lead to the further conclusion that an employer must always consult with the union before letting such a contract. The fairness or unfairness of unilateral action depends upon the interpretation of section 8(a)(5), as applied to each particular situation, including the terms of any relevant collective agreement and the customs and practices of the industry. Arguments based upon the need for leaving management freedom to effectuate prompt decisions should be directed to those questions. On the other hand, the necessary effect of construing "terms and conditions" of employment so as to exclude contracting out is to relieve the employer of any legal obligation ever to negotiate about any restriction upon an unlimited prerogative.

This is not a purely technical distinction. Labor-management negotiations concerning contracting out

may take either of two forms. The bargaining may deal with the procedure and substantive rules to be followed during the term of the agreement when the prospect of letting particular contracts becomes real—provisions to be written into a collective agreement governing the employer-employee relationship for a substantial period of time. In those contract negotiations there is no problem of immediate operational decisions and no greater need for unilateral action than in fixing any other term of employment.

On the other hand, the union may be concerned about the letting of a particular subcontract. Such problems arise from time to time, usually without relation to the periodic negotiation of collective bargaining agreements. In some industries decisions concerning subcontracting are made weekly or monthly; in others they recur infrequently. The decision is operational. It may turn on problems of financial management, scheduling, cost and labor supply within management's special expertise. Its effect upon the employees would also depend upon many circumstances. Similarly, one can imagine some cases in which business exigencies would necessitate prompt action but others in which there would be ample time for detailed negotiation. The problem of letting a particular subcontract may arise (1) during the term of a collective bargaining agreement or (2) in the absence of an existing agreement.

(1) If the parties deal with future subcontracting in their collective bargaining agreement, the problem of unilateral action is removed to the sphere of contract administration. One of the strengths of collec-

tive bargaining has been its capacity for creating procedures and substantive rules suited to the needs of the industry and even the particular business. We have already called attention to the variety of contract stipulations negotiated between management and labor arranging for the handling of subcontracts as the occasions arise during the term of the collective bargaining agreement.[25] While one extreme calls for vesting absolute freedom to subcontract in management and the other extreme bars subcontracting without the consent of the union, there is a wide range of intermediate accommodations apparently securing the most vital interests of both employers and employees according to the precise industrial circumstances. The place to work out a framework for future subcontracting that takes into account the needs of the business, the kinds of subcontracting involved, the role of management's specialized skill and the host of other relevant considerations varying from business to business, is in the periodic contract negotiations. Cox and Dunlop, *op. cit. supra.*

The negotiated agreement effectively fixes the parties' subsequent duties. If he is acting in good faith, the employer is legally free to negotiate even for a clause securing him the right to let subcontracts without consulting the union. *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395; *Peerless Distributing Co.*, 144 NLRB No. 142, November 13, 1963, 54 LRRM 1285. Such a clause would be a defense against any charge of refusal to bargain based upon unilateral action during the term

[25] See pp. 29–31, *supra.*

of the agreement. *General Controls Co.*, 88 NLRB 1341, 1342; *The Hughes Tool Co.*, 100 NLRB 208, 209; *Leroy Machine Co.*, 147 NLRB No. 140, June 30, 1964, 56 LRRM 1369. See, also, *Phelps Dodge Copper Products Corp.*, 96 NLRB 982; *Avco Mfg. Co.*, 111 NLRB 729, 732–733. If the extent of the contractual provision permitting subcontracting were disputed and the controversy were arbitrable under the contract, adherence to the contract procedure would normally be a "defense" to charges under section 8(a)(5). *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 510–511; *United Telephone Co. of the West*, 112 NLRB 779. While management may not always be able to negotiate the kind of clause that it desires, because of the opposite interests of the employees, the accommodation resulting from the free interplay of the opposing forces is likely to be a better arrangement for the particular parties, in their peculiar situation, than any solution the law might dictate as a uniform rule for all industries. It is there that the problem of the unilateral letting of subcontracts should be resolved.

The situation is more complicated if the parties sign a collective agreement without express provision for subcontracting. One solution is to treat the parties as if no agreement were in force. Another view is that there are many matters, which inevitably pass unmentioned, as to which every contract necessarily assumes a continuation of the *status quo*. Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 Harv. L. Rev.

1097. The Board's decisions make the issue turn, in part, upon whether the subject was raised in the negotiations and, in part, upon the form of any proposals made and withdrawn. *Proctor Mfg. Corp.*, 131 NLRB 1166, 1169–1171; *The Press Co., Inc.*, 121 NLRB 976, 977–980; *Beacon Piece Dyeing & Finishing Co.*, 121 NLRB 953, 956–961; *Speidel Corp.*, 120 NLRB 733, 739–741; *Jacobs Mfg. Co.*, 94 NLRB 1214, enforced, 196 F. 2d 680, 683–684 (C.A. 2). Thus, in *National Labor Relations Board* v. *Adams Dairy*, 322 F. 2d 553 (C.A. 8), now pending upon petition for certiorari, No. 25, this Term, the Board held that the union's abandonment in collective bargaining of its request for a contractual prohibition upon subcontracting did not waive its statutory right to be notified and negotiate before the employer replaced its driver-salesmen employees with "independent distributors" who covered the same routes but bought and resold the dairy products.[36]

That problem, however, is not involved in this case. There is no necessary relation between the only issue raised by petitioner—is contracting out within the subject matter of statutory bargaining—and the question, what effect has a collective agreement upon the duty to bargain about subjects not mentioned therein. The latter question is not confined to subcontracting; it has arisen even more sharply with reference to conceded subjects of collective bargaining such as pen-

[36] The Board's reasons for its view have recently been amplified. See *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB No. 133, June 30, 1964, 56 LRRM 1321. For a critical analysis, see Farmer, *Good Faith Bargaining Over Subcontracting*, 51 Georgetown L.J. 558, 571–577.

sions and insurance. It need not be decided here because petitioner waited until the existing collective bargaining agreement had been reopened.

(2) In the absence of an existing agreement the problem of unilateral action must be resolved solely by reference to the statutory duty "to bargain collectively." Neither the Board nor the courts have had occasion to examine the problem in all its ramifications, nor do we attempt such an analysis in the present case. It is enough to point out the basis for our insistence that a holding that subcontracting is a subject for statutory bargaining does not automatically lead to the conclusion that, in the absence of an existing agreement on the subject, there is always an absolute duty to engage in full negotiations before any contract can be let.

The permissibility of unilateral subcontracting would seem to depend largely upon the circumstances of the particular case. In the instant case the contract letting out the work to Fluor was unusual, both in the sense that most concerns do their own maintenance work of the kind involved and also in the sense that the letting of such contracts was not a recurrent event, in an established pattern, resulting from the nature of the employer's business. The problem would be altogether different if the employer was regularly engaged in subcontracting, according to the needs of the business, and the union, although the collective agreements were silent, had always accepted the practice in silence without seeking to negotiate. In *National Labor Relations Board* v. *Katz,* 369 U.S. 736, the Court held that "an employer's unilateral

change in conditions of employment under negotiation is * * * a violation of § 8(a)(5)" (p. 743) because it is "tantamount to an outright refusal to negotiate that subject" (p. 746), but the Court reserved judgment as to whether "there might be circumstances which the Board could or should accept as excusing or justifying unilateral action" (p. 748). Indeed, the opinion suggests that unilateral action which follows a familiar past practice—in effect "a mere continuation of the status quo"—may not be an unfair labor practice *per se* (p. 746). Whether that result is appropriate in some cases of subcontracting can be decided when the question is raised in a particular case. Another possibly relevant circumstance may be the existence of business exigencies demanding action before negotiations could be undertaken. Again, some things may depend upon the kind of subcontracting. We do not anticipate the answers to such questions. Our point is that the questions can fairly be left open for the present because it is in defining the duty to bargain that past practice, business exigencies and the distinctions between the varieties of "subcontracting" should be taken into account—not in the interpretation of the critical phrases determining the subjects of statutory bargaining.

Third. Just as sections 8(a)(5) and 8(d) leave a measure of flexibility with respect to unilateral action so are the statutory requirements concerning the character and length of negotiations adaptable to the character of the subcontracting and the exigencies of the particular business situation. An employer is under no duty to yield to the union. The employer's

duty, as the Board explained in the leading case on subcontracting, is only to bargain in good faith. The "obligation to bargain in nowise restrains an employer from formulating or effectuating an economic decision to terminate a phase of his business operations. Nor does it obligate him to yield to a union's demand that a subcontract not be let, or that it be let on terms inconsistent with management's business judgment" (*Town & Country Mfg. Co.*, 136 NLRB 1022, 1027).

The amount of time and discussion required to satisfy the statutory obligation "to meet at reasonable times and confer in good faith" would vary with the circumstances. Ordinarily, before the employer reaches a final decision to take action, he must meet with the union, if it so desires, and give it the reasons for his proposed action. He must hear in good faith any union arguments for a contrary policy. Alternatives must be explored. Then either the employer and union will agree or the employer will make its decision and the union may resort to self-help. But the rule is not doctrinaire[37] and sometimes the employer may act sooner.

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[37] See, *e.g.*, *Exposition Cotton Mills*, 76 NLRB 1289, 1291–1292; *W.W. Cross & Co.*, 77 NLRB 1162, 1164–1167; *Massey Gin & Machine Works*, 78 NLRB 189, 198–202; *Braswell Motor Freight Lines*, 141 NLRB 1154, 1163, 1165; *Waukesha Sales & Service*, 137 NLRB 460, 468; *Instrument Division, Rockwell Register Corp.*, 142 NLRB 634, 642–643; *Schnell Tool & Die Corp.*, 144 NLRB No. 52, Sept. 6, 1963, 54 LRRM 1064; *The Celotex Corp.*, 146 NLRB No. 8, February 20, 1964, 55 LRRM 1238; *The Little Rock Downtowner, Inc.*, 148 NLRB No. 78, August 31, 1964, 57 LRRM 1052; *Lasko Metal Products*, 148 NLRB No. 104, Sept. 17, 1964. See also, *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 150–152 (C.A. 7).

In an emergency it may not be possible to consult the union before taking action; in that event, the mere fact that the employer acted unilaterally would not warrant an inference of bad faith. Similarly, an inference of bad faith may not be justified where the work which the employer has unilaterally contracted out clearly is of a *de minimis* nature (*e.g.*, the repair of a flat tire on a company truck), or beyond the technical capacity of his personnel or machines.[38] Moreover, even where the employer is able to, and does, meet with the union before reaching a final decision, the amount of negotiation required in order to satisfy the statutory standard must take into account the exigencies of the business and the potentials of further negotiations. If the economic forces pressing the employer to contract out the work are beyond the union's control and the union can offer no compensating concession, an "impasse" in the negotiations that would permit the employer to take action may be reached far sooner than where there was ample time for negotiation or the union was in a position to alleviate the conditions which motivated the employer's proposed action, and was advancing meaningful alternatives. The Act "does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position." *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 404.[39]

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[38] Compare the situations in which arbitrators have found exceptions to a contractual limitation on contracting out (fn. 27, p. 33, *supra*).

[39] *Hartmann Luggage Company*, 145 NLRB No. 151, February 7, 1964, 55 LRRM 1206, illustrates the flexible nature of the bargaining obligation. There the employer had long been

Similarly, it is one thing for an employer, after brief discussion, to let one of the small contracts which have been a regular part of his business and upon which he must take action or miss the business opportunity, while he continues to negotiate a broader

in economic difficulties and at various times had discussed with the union the probability of contracting out the work of one of his plants. However, when the employer actually entered into the contract, he did not specifically apprise the union in advance of his proposed action; nevertheless, he did thereafter engage in prolonged discussions with the union before the situation was so far advanced as to preclude a reasonable resolution of the problems raised by the contract. The Board, considering all the circumstances, concluded that the employer had not violated his bargaining obligation under the Act. The Board held that, though the employer's action in signing the contract without first negotiating with the union was a "*prima facie* case of refusal to bargain," this was overcome by the employer's "overall conduct, both prior and subsequent to the execution of the subcontracting agreement" (slip decision, p. 2). Moreover, the Board, although sustaining the Trial Examiner's action in dismissing the complaint, declined to adopt his view that the bargaining obligation "necessarily required the Respondent to give the Union notice of the specific proposed subcontracting arrangement just 'at the time the Company was prepared to make a firm offer to [the subcontractor] or to accept a counteroffer from [it],' and to furnish the Union at that moment an opportunity to bargain precisely with reference thereto before consummating that subcontracting agreement" (slip decision, pp. 1–2).

See, also, *Montgomery Ward & Co.*, 137 NLRB 418 (employer did not violate his bargaining obligation when he established terminals for his truckdrivers at new locations without first negotiating with the union, for he had notified the union well in advance of his intention and the union had never asked for bargaining on the terminal issue); *Motoresearch Co.*, 138 NLRB 1490 (employer did not violate the Act in unilaterally subcontracting work to a subsidiary, since the union knew of the subcontracting and made no mention of it in 18 bargaining sessions).

accommodation for the future. It is quite another for him permanently to wipe out an entire bargaining unit without thorough discussion, when the decision just as well can be postponed a week or a month. Nothing in sections 8(a)(5) or 8(d) precludes the Board from taking such factors into account. There is every indication that the Board is aware of their importance.[40]

The freedom to negotiate mutually satisfactory arrangements concerning the future letting of other subcontracts, as the occasions arise, meets many of the fears that have been expressed concerning the danger that the necessity of collective bargaining about "contracting out" may unduly hamper management in meeting business opportunities and exigencies. Additional flexibility is introduced both by the legal principles governing the right to take unilateral action and by the kind of negotiation that is required to satisfy the obligation to bargain in good faith. No doubt employers remain subject to some restrictions upon the kind of freedom that might best serve their interests, assuming that employers always acted fairly and wisely without the necessity of consulting the representatives of their employees. The same argument can be made, upon the same assumption, about a host of traditional subjects of collective bargaining. The judgment Congress expressed in enacting the National Labor Relations Act was that the interests of employees should be consulted, and that the public interest, which includes the interests of both employers and employees, would be best served by subjecting problems between labor and management

[40] See cases cited n. 39, pp. 51–52, and n. 47, pp. 69–71, above.

to the mediatory influence of collective bargaining. The words of the Court in *Wiley* v. *Livingston*, 376 U.S. 543, 549, are applicable here even though the case deals with a different subject:

> The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. * * *

E. THE DECISIONS OF THIS AND OTHER COURTS SHOW THAT "CONTRACTING OUT" IS A SUBJECT OF MANDATORY COLLECTIVE BARGAINING

In *Order of Railroad Telegraphers* v. *Chicago & North Western Railway Co.*, 362 U.S. 330, it appeared that the railroad, operating at a loss, had decided to abolish some stations and consolidate others, which would result in a reduction of the number of its employees. The railroad offered to negotiate about severance pay for the employees dismissed but refused to negotiate with the bargaining representative about its decision to abolish the jobs, contending that that was a management prerogative. When the union threatened a strike, the railroad sought an injunction, arguing that its issuance was not barred by the Norris-LaGuardia Act because the case was not one "involving or growing out of a labor dispute" (29 U.S.C. Sec. 104). The term "labor dispute" is defined in the Norris-LaGuardia Act as "any controversy concerning terms or conditions of employment"

(29 U.S.C. Sec. 113(c)). The Court rejected the railroad's contention, saying (362 U.S. at 335–336)—

> Unless the literal language of this definition is to be ignored, it squarely covers this controversy. * * *
>
> Plainly the controversy here relates to an effort on the part of the union to change the "terms" of an existing collective bargaining agreement. The change desired just as plainly referred to "conditions of employment" of the the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. * * *

The Court also rejected the railroad's argument that the union was acting unlawfully under the Railway Labor Act in pressing its demand that the railroad bargain collectively about the closing of the stations (p. 339):

> Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads assert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions." 45 U.S.C. § 152, First.

The quoted phrase from the Railway Labor Act is certainly no broader than sections 8(d) and 9(a) of the National Labor Relations Act. The latter are

couched in phrases substantially identical with the Norris-LaGuardia Act; indeed, the definition of labor dispute in section 2(9) of the National Labor Relations Act is taken from the earlier Norris-LaGuardia Act, and it can hardly be supposed that the words "terms or conditions of employment," in section 2(9) carry a different meaning than the same words in sections 8(d) and 9(a). Nor is there any plausible basis for saying that shutting down part of a company's operation with the resulting discharge of employees involves "terms or conditions of employment" while contracting out the work with the same consequence does not. Petitioner's efforts to distinguish the case as one involving only the Norris-LaGuardia Act (Br. 23–25) overlook not only the nexus between the statutes but also the Court's explicit mention of the duty to bargain.

Local 24 v. *Oliver*, 358 U.S. 283, is also in point. At issue was the validity under the Ohio antitrust laws of Article XXXII of a collective bargaining agreement which fixed the minimum rental to be paid by motor carriers who leased vehicles to be driven by their owners instead of the carriers' employees. In holding that the National Labor Relations Act preempted the field against the application of the Ohio antitrust laws, the Court readily concluded (pp. 294–295) that—

> [T]he obligation under § 8(d) on the carriers and their employees to bargain collectively "with respect to wages, hours, and other conditions of employment" and to embody their understanding in "a written contract incorporating any

agreement reached," found an expression in the subject matter of Article XXXII. * * *

The substitution of owner operators driving their own trucks for a carrier's trucks driven by its own employees is virtually a form of subcontracting, for the only difference is that the work of employees in the bargaining unit is let out piece meal rather than in a lump. Indeed, in reaching its conclusion the Court cited *Timken Roller Bearing Co.*, 70 NLRB 500, 518, reversed on other grounds, 161 F. 2d 949, (C.A. 6), where the Board had held that sections 8(a) (5) and 9(a) require an employer to bargain about the subcontracting of work which may remove jobs from the bargaining unit.[41]

Although decisions of the courts of appeals are not uniform, a good number of them give strong support to the view that subcontracting is a subject on which the employer has a duty to bargain under section 8(a) (5). In some, which are distinguishable on their facts because there was a finding that the decision to subcontract, or to shut down an operation, was motivated by the desire to interfere with union organization, the employer's motivation was technically irrelevant to the charge of refusal to bargain and the rationale was in fact the same as the reasoning below in the instant case. *National Labor Relations Board* v. *Brown-Dunkin Co.*, 287 F. 2d 17 (C.A. 10); *Town & Country Mfg. Co.* v. *National Labor Relations Board*, 316 F. 2d 846, 847 (C.A. 5); *National Labor Relations Board* v. *Preston Feed Corp.*, 309 F. 2d 346 (C.A. 4); *National Labor Relations Board* v. *Savoy*

[41] See pp. 58–60 below.

Laundry, Inc., 327 F. 2d 370 (C.A. 2); *National Labor Relations Board* v. *Kelly & Picerne, Inc.*, 298 F. 2d 895 (C.A. 1). Contra, *National Labor Relations Board* v. *Adams Dairy Inc.*, 322 F. 2d 553 (C.A. 8), pending on petition for certiorari, No. 25, this Term.

Petitioner's argument (Br. 14–15, 30–36) that an administrative interpretation had been engrafted upon the statute by a consistent course of administrative interpretation, fails for two reasons.

First, it is historically inaccurate. The administrative interpretation was neither consistent nor well-established. *Brown-McLaren Mfg. Co.*, 34 NLRB 984, the first case cited by petitioner, is too long and complicated an opinion for a summary to be useful, but we believe that anyone reading the opinion will agree that the ruling that the employer did not refuse to bargain upon a particular occasion rested not upon an interpretation of the phrase "terms and conditions of employment" but largely upon the view that the subject had been exhausted in prior negotiations (see pp. 1006–1007). In *Mahoning Mining Company*, 61 NLRB 792, the opinion very clearly shows (pp. 796, 802–804) that the issue was not whether there was a duty to bargain about the letting of the contracts, but whether the respondent was the employer of the men working in the mines after the contracts had been let.

Thus, the first case in which the Board really considered whether there was a duty to bargain about subcontracting was *Timken Roller Bearing Co.*, 70 NLRB 500, reversed on other grounds, 161 F. 2d 949 (C.A. 6). Petitioner seeks to brush the ruling aside as a minor point in a case with many issues, but

the Board's consideration appears quite thorough. The trial examiner discussed the subject at length (p. 518):

> Without attempting generally to delimit the subject matter properly included within the scope of collective bargaining, it seems apparent that the [employer's] system of subcontracting work may vitally affect its employees by progressively undermining their tenure of employment in removing more and more work, and hence more and more jobs, from the unit. * * * It is the [employer's] duty to sit down and discuss these matters with the Union when requested to do so. During such discussion it may develop, for example, that the Union will engage to supply sufficient skilled labor in the crafts in question, so that more work may be done by the [employer's] employees and less by workers outside the unit; it might be that the [employer] will convince the bargaining representative that there is no reasonable alternative to a continuation of the [employer's] present practice in this respect; or some other and presently unthought of solution agreeable to both parties may suggest itself.
>
> On none of the issues now dividing the parties is the [employer] compelled to reach an agreement with the Union. * * * The requirement is that the [employer] consult with the Union and explore in good faith the possibility of reaching an agreement so that, in conformity with the purposes of the Act, the matter may be removed, so far as it is possible, as a cause of industrial strife.

The Board did not elaborate on this analysis in its own opinion, but it did explicitly state that it approved

the trial examiner's ruling on the question of subcontracting (p. 504).

That was the state of the decisions in 1947 when Congress considered the scope of the duty to bargain collectively. There was a strong effort to define the subjects on which employers must bargain in such a way as to limit the scope of mandatory negotiations. The aim was plainly to prevent the further evolution of collective bargaining into areas not previously occupied. Such provisions were included in the House bill, as we pointed out at p. 21 above. The minority report of the House Labor Committee criticized the change upon the ground that it would impart rigidity where there should be flexibility and opportunities for growth; it specifically cited subcontracting as one of the subjects that should not be arbitrarily excluded from the scope of the statutory obligation.[42] The conference committee apparently acceded to this view for the changes proposed by the House were stricken from the Taft-Hartley Act.[43] If any inference is to be drawn from the sequence of events it is that Congress did not intend to foreclose adherence to the ruling in *Timken Roller Bearing Co.*

During the ensuing years there was a scattering of Board opinions and trial examiners' reports which gives some slight support to petitioner's argument. All except one of the cases is distinguishable, however, and none involved thorough consideration of the mat-

[42] Minority Report on H.R. 3020, 80th Cong., 1st Sess., p. 71, 1 Legislative History of the Labor Management Relations Act, 1947 (G.P.O., 1948) 362.

[43] 93 Cong. Rec. 6443, 2 Leg. Hist. 1539.

ter now at issue. *Walter Holm & Co.*, 87 NLRB 1169, rests upon alternate grounds: first, that an employer may go out of business without negotiating with the union; second, that the union did not seek to bargain. *Krantz Wire & Mfg. Co.*, 97 NLRB 971, apparently rests upon the former ground alone, but there are differences between "going out of business" entirely and turning over part of the work in one's plant to the employees of a subcontractor instead of the employees in the bargaining unit. *Celanese Corp. of America*, 95 NLRB 664, appears from petitioner's statement to be an ordinary case of contracting out, but the Board's opinion shows that the contracting out was bringing in a contractor and its work force to do the work of the strikers in the same way that replacements may be hired—a step which is always taken without bargaining about the replacements with the union. Finally, it is true that the *National Gas Company* litigation (99 NLRB 273) was conducted on the assumption that the company's decision to contract out installation work was not a bargainable matter. Since everyone joined in that assumption, the case can hardly be regarded as a considered interpretation by the Board.

The argument that the decision in *Town & Country Mfg. Co., Inc.*, upset what had been settled Board doctrine for 27 years is belied by the expert commentary and continuous discussion of the question.[44] The

[44] Chamberlain, *The Union Challenge to Management Control* (Harper & Brothers, 1948), p. 326; Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 413–418; Fleming, "The Obligation to Bargain in Good Faith" in Shister, *Public Policy and Collective Bargaining* (Harper and Row, 1962), pp. 72–73;

most the record shows, we believe, is that, despite the strong declaration that subcontracting was bargainable in *Timken Roller Bearing Co., supra,* the Board did not press the rule, perhaps because the question was not urgent or perhaps because the Board believed it would be unwise for a government agency to break new ground in collective bargaining practice before there were clearer indications of its importance in industrial life. Today, as we have shown, contracting out is, in fact, a major issue in labor-management relations and a widely accepted subject of collective bargaining, even though some employers continue to insist upon asserting a management prerogative.

The second objection to petitioner's argument is that the content of the words "terms and conditions of employment" cannot be confined to a specific list of topics by the course of administrative decision. The subject matter of collective bargaining today is not limited to the subjects upon which there was negotiation in 1935. The subjects of negotiation in the 1970's may well include topics about which there is no bargaining today. The contrary view was rejected by the course of history as well as the law when pensions, retirement, and health insurance became subjects of labor-management negotiations. See

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Inside vs. *Outside*, 65 Fortune 215 (May 1962); Lieberman, *The Collective Labor Agreement* (Harper & Brothers, 1939), pp. 76–78; Slichter, *et al.*, *The Impact of Collective Bargaining on Management* (Brookings Institution, 1960), p. 282; Slichter, *Union Policies and Industrial Management* (Brookings Institution, 1941), pp. 437–441; Smith, *Collective Bargaining* (Prentice-Hall, 1946), pp. 186–187; *Collective Bargaining Provisions, Union and Management Functions, Rights and Responsibilities* (Bur. Lab. Stat. Bull. No. 908–912, 1949), pp. 20–26.

Inland Steel Co. v. *National Labor Relations Board,* 170 F. 2d 247, 254 (C.A. 7), certiorari denied on this point, 336 U.S. 960.

The national labor policy, except for limited specific prohibitions, does not undertake to assign prerogatives to management or labor, nor does it specify a list of subjects of joint concern. It is concerned with the institutional framework and methods for resolving whatever conflicts of interest arise between labor and management out of the actual course of events, at least when they directly relate to tenure of employment. Events have made "contracting out" such an issue and have thus brought differences concerning it within the framework provided by the Act.

II

PETITIONER VIOLATED ITS STATUTORY DUTY OF COLLECTIVE BARGAINING BY SUBSTITUTING A LABOR CONTRACTOR FOR THE EMPLOYEES IN THE BARGAINING UNIT WITHOUT PRIOR NEGOTIATION WITH THE UNION

The principle is well established that, in the absence of a contractual privilege or similar justification, unilateral action by an employer violates section 8(a)(5) if it is, in effect, a refusal to meet and negotiate with the employees' representatives about a statutory subject of collective bargaining. *National Labor Relations Board* v. *Katz,* 369 U.S. 736. Compare *Medo Corp.* v. *National Labor Relations Board,* 321 U.S. 678; *May Department Stores Co.* v. *National Labor Relations Board,* 326 U.S. 376; *National Labor Relations Board* v. *Crompton-Highland Mills,* 337 U.S. 217. Whatever may be the bearing of this principle

upon other cases (pp. 42–54 above), it plainly condemns petitioner's conduct.

Petitioner's conduct made it as plain as a flat refusal that petitioner would not negotiate with the Union about the abolition of the entire bargaining unit by substituting for the employees in the unit an outside firm hired to bring new employees into the plant and do the maintenance work under petitioner's ultimate direction.[45] The collective bargaining agreement had just been reopened. Negotiations for a new contract were impending. Although the Union made no request for negotiation in advance of the contracting out, because it had no warning that such a step would be taken, petitioner cannot have had the slightest doubt of the Union's interest in the bargaining unit or of its desire to negotiate about a measure that would deprive existing maintenance employees of their jobs and wipe out the Union's right of representation.

It is equally plain that petitioner is in no position to argue that the contract was let pursuant to an established mode of procedure. There is no evidence of prior contracts let in the same manner as recurrent steps in the normal conduct of the business and

[45] It could well be argued that petitioner's letter and statement on July 27, 1959, were themselves a flat refusal to negotiate. As the court below concluded (R. 174):

"The record clearly shows that the Company met with the Union to announce that it had decided to contract out the maintenance work, and that it would not bargain on this decision. This position was consistent with the Company's belief that contracting out was exclusively a "management prerogative" about which it could take unilateral action without first bargaining to impasse with the Union. * * *"

accepted by all concerned as a management responsibility. On the contrary, contracting out the entire body of maintenance work, with the resulting discharge of a large part of the work force, is an abnormal measure, rarely adopted, as to which there could hardly be an accepted practice. Therefore, petitioner does not, and could not, defend its unilateral action as "a mere continuation of the status quo." Compare *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 746.

Nor can it be argued that petitioner, facing the business necessity of an immediate decision, had no time for negotiation with the Union. There is no evidence of an emergency. An established firm would hardly decide to contract out all its plant maintenance without careful study. If any inference had to be drawn from the known facts, therefore, it would be that petitioner had been considering the step for some time but deliberately waited in silence until the expiration of the old agreement when it could present the Union with a *fait accompli* without risk of arbitration. It is enough to point out, however, that there is no evidence of pressure to act before there was an opportunity to bargain with the Union. Petitioner could have bargained if it wished. It preferred to assert a "prerogative."

That assertion was, under the circumstances, equivalent to an outright refusal to negotiate about the proposed "contracting out." Since the contract so affected terms and conditions of employment as to be a statutory subject of bargaining, petitioner thereby violated section 8(a)(5).

III

THE BOARD DID NOT EXCEED ITS POWER TO FRAME A REMEDY BY DIRECTING PETITIONER TO RESUME ITS MAINTENANCE OPERATIONS AND REINSTATE ITS MAINTENANCE EMPLOYEES WITH BACK PAY

Upon finding that petitioner violated section 8(a)(5) by unilaterally substituting a labor contractor for the employees in the bargaining unit, the Board ordered petitioner to resume its maintenance operations, to reinstate the maintenance employees with back pay, and to bargain collectively with the Union (R. 19, 27). The order, we submit, was well within the remedial powers of the Board.

Section 10(c) empowers the Board, upon finding that an unfair labor practice has been committed, to issue an order requiring the violator to cease and desist and—

> to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

In framing the remedy the Board has wide discretion. "'[T]he relation of remedy to policy is peculiarly a matter for administrative competence * * *.'" *National Labor Relations Board* v. *Seven-Up Co.*, 344 U.S. 344, 349; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194. The Board is to draw upon its experience with the practical workings of industrial relations as well as the need "of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment" (*id.* at 198). The Board's order will stand "unless

it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act" (*Virginia Electric Co.* v. *National Labor Relations Board*, 319 U.S. 533, 540).

No remedial principle is clearer than that restoration of the *status quo ante* tends to effectuate the policies of the Act. The rule has found a wide variety of applications.[46] Restoration of the *status quo* pre-

[46] See, *e.g.*, *National Labor Relations Board* v. *Newport News Shipping & Dry Dock Co.*, 308 U.S. 241, 250 (disestablishment ordered of labor organization in whose formation employer unlawfully interfered); *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 361–366 (employer ordered to cease giving effect to individual contracts secured through unfair labor practices and to notify employees they were released from obligations imposed by those contracts); *Virginia Electric Co.* v. *National Labor Relations Board*, 319 U.S. 533, 538–544 (dues paid to employer-dominated labor organization ordered reimbursed to employees from whose wages they had been withheld under closed-shop, check-off arrangement); *ILGWU* v. *National Labor Relations Board*, 366 U.S. 731, 735, 736, 739–740 (employer ordered to withdraw recognition from union that lacked majority support when originally recognized and to cease giving effect to collective bargaining agreement executed with that union after it had secured majority); *Franks Brothers* v. *National Labor Relations Board*, 321 U.S. 702 (employer ordered to bargain with union, notwithstanding its loss of majority, where such loss was attributable to the employer's unfair labor practices); *National Labor Relations Board* v. *Talladega Cotton Factory*, 213 F. 2d 209, 216–217 (C.A. 5); *National Labor Relations Board* v. *Monkey Grip Co.*, 243 F. 2d 836 (C.A. 5), certiorari denied, 355 U.S. 864 (supervisors ordered reinstated with back pay, although not themselves accorded the protections of the Act, to remedy coercive effect of their discharges on rank-and-file employees); *National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847, 856–857 (C.A. 8) (reinstatement ordered of brewing company employees whose delivery work had been transferred under pressure of union

vents the employer from gaining advantage by his unfair labor practice. Compare *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U.S. 702, 705. It also secures employees freedom in the exercise of their statutory rights, by assuring them that the law, despite inevitable delays in enforcement, will put them as nearly as possible in the same situation as if the law had been obeyed.

That is the principle which the Board applied in the present case. For petitioner to reinstate the employees who lost their jobs, resume its own maintenance work, and then bargain with the Union, if it still desires to contract out the operation, will recreate as nearly as possible, the situation that would have existed if there had been no unfair labor practice.

It is argued that the order places an undue burden upon petitioner and interferes with its freedom to manage its own business by requiring it to resume operations that it wishes to abandon. The practical extent of the burden was for the Board to consider along with the adequacy of possible remedies such as

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jurisdictional dispute to trucking company having contract with another union; order further required the discharge of trucking company employees performing this work, if necessary, and, if sufficient jobs were still not available for displaced brewing company employees, their placement on a preferential hiring list); *National Labor Relations Board* v. *Preston Feed Corp.*, 309 F. 2d 346, 351–352 (C.A. 4) (employer ordered to resume trucking operation whose discontinuance for economic reasons had been accelerated by antiunion considerations, and to reinstate with back pay employees displaced as a result of this action); *National Labor Relations Board* v. *Central Illinois Public Service Co.*, 324 F. 2d 916, 919 (C.A. 7) (employer ordered to restore gas discount which was discontinued without first bargaining with the union).

an order to negotiate about the resumption of maintenance work. Since petitioner is familiar with the problems of plant maintenance and is still having essentially the same kinds of maintenance work done in the same plant, still with its own equipment and under its own ultimate control, there would seem to be relatively little interference with the normal course of the company's business. The Board so found (R. 25). Against any burden on petitioner the Board had to weigh the difference to the employees between bargaining about the proposed abandonment of an operation in which they were actively engaged and negotiating as outsiders for the resumption of an operation which had been abandoned as far as they were concerned. The importance of the difference was for the Board to appraise out of its experience with industrial relations. Certainly, it was not unreasonable to conclude that the difference would have great practical importance to the actual conduct of the negotiations.

The interference, moreover, is purely temporary. The order leaves petitioner the same freedom to contract the work out after negotiating with the Union in good faith that it had before the unfair labor practice. Any pressure put upon petitioner by fear that its good faith may be suspect if the bargaining breaks down and it then contracts out the maintenance work was a factor for the Board to weigh along with other relevant considerations. The balance struck is not unreasonable.[47]

[47] The Board has never automatically required an employer to resume the work "contracted out," but has tailored its order to the particular circumstances presented. In *The Renton News*

Such arguments as that the former employees' unwillingness to accept reinstatement will frustrate the effort to restore the *status quo* (Pet. Br. pp. 43–44), raise only questions of fact upon which the Board's conclusion is decisive.

Record, 136 NLRB 1294, the Board, although finding that the employers violated section 8(a)(5) by unilaterally contracting out their composing room operations, declined to order them to reinstate those operations and to bargain with the union about their discontinuance, on the ground that this would impose an inordinately heavy burden in view of "*all*" the factors present. The Board noted that: The employers "were faced with the choice of either changing their method of operation to one at least equal to that of their competitors, or being forced to go out of business. They selected the former alternative. The change adopted to accomplish their purpose involved a totally different process and required the participation of other weekly newspapers and an individual, none of [whom] is a party to this proceeding" (pp. 1297–1298). Similiarly, in *Pepsi-Cola Bottling Company of Beckley, Inc.*, 145 NLRB No. 82, January 3, 1964, 55 LRRM 1051, the Board declined to order the employer to reopen its plant and reinstate the terminated employees, because he had arrived at his decision before the union had begun to organize the employees, the decision was attributable to unsatisfactory sanitary and other conditions at the plant, and the union had refused to withdraw its pickets long enough to permit the employer to correct those conditions (slip decision, p. 2). In *Winn-Dixie Stores, Inc.*, 147 NLRB No. 89, June 26, 1964, 56 LRRM 1266, the Board, although finding that the employer violated the Act by unilaterally discontinuing his cheese processing operation, did not order the reestablishment of that operation, in view of "the likelihood that the affected employees are suitable for employment elsewhere in the Respondent's organization, and the possibility that the discontinued operation may now be outmoded" (slip decision, p. 5). The Board ordered the employer to bargain with the union about the resumption of the operation, and added a requirement "that the employees whose statutory rights were invaded by reason of the Respondent's unlawful unilateral action, and who may have suffered losses in consequence thereof, be reimbursed for such losses until such time as the Respondent remedies its

Petitioner's attack upon the order of reinstatement also lacks merit. Nothing in section 10(c) limits the Board's power to order reinstatement to cases involving violation of section 8(a)(3). Nor is it the whole truth for petitioner to say that this is "the first instance in the history of the Act in which the Board has ordered reinstatement in a case involving only a refusal to bargain" (Pet. Br. 39–40). There are innumerable cases in which an unfair refusal to bargain resulted in a strike and the Board ordered reinstatement of the strikers, even though their jobs had been filled, as a remedy for the violation of section 8(a)(5). Technically the Board also alleged violations of sections 8(a)(1) and 8(a)(3), but the thrust of the orders,

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violation by doing what it should have done in the first place" (slip decision, p. 6). In *Fairbanks Dairy, Division of Cooperdale Dairy Company*, 146 NLRB No. 111, April 17, 1964, 55 LRRM 1437, the Board, though finding that the employer violated the Act by entering into a lease arrangement which converted some of his drivers into independent contractors without first bargaining with the union, did not order a restoration of the *status quo* pending future bargaining because "no employee's connection with the Respondent [except one] was severed as a result of Respondent's unlawful action," "all three individuals, as lessees, have made significant investments in their business and have undertaken financial obligations," and two of the individuals "now claim to earn much more money than they did as employees" (trial examiner's decision, p. 13). And, in *Royal Plating and Polishing Co.*, 148 NLRB No. 59, August 27, 1964, 57 LRRM 1006, the Board, on finding that respondent had violated section 8(a)(5) by withholding from the union in contract negotiations that it had arranged to sell the premises to the city housing authority, did not order respondent to resume the operation but merely to pay the employees what they lost in wages during the seven-month period between the unlawful refusal to bargain and the date when respondent was required to vacate the premises under its agreement with the housing authority.

in many instances, was to restore the *status quo ante* the refusal to bargain by reinstating the unfair labor practice strikers and ordering negotiations.[48]

Even more frivolous is the claim that the Board had no power to order reinstatement because the employees were discharged for cause within the meaning of the penultimate sentence of section 10(c) (Pet. Br. 40-42). The passages quoted by petitioner from the opinion in *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1, and Senator Taft's remarks during the Taft-Hartley debate, plainly refer to the typical case under section 8(a)(3), in which the Board must decide whether an employee was discharged for misconduct or union activities. But, it does not follow that, just because an employee is not discharged for union activity, that the discharge is "for cause." If, as here, the discharge flows from conduct which constitutes an unfair labor practice, the discharge cannot be "for cause" within the meaning of section 10(c). Petitioner's interpretation would, for example, upset the settled practice of ordering the reinstatement of unfair labor practice strikers whose positions have been filled by

[48] See, *e.g.*, *National Labor Relations Board* v. *Dell (Waycross Machine Shop)*, 283 F. 2d 733, 740–741 (C.A. 5); *National Labor Relations Board* v. *Rutter-Rex Mfg. Co.*, 245 F. 2d 594, 598 (C.A. 5); *National Labor Relations Board* v. *Efco Mfg., Inc.*, 227 F. 2d 675, 676 (C.A. 1), certiorari denied, 350 U.S. 1007; *National Labor Relations Board* v. *Peckeur Lozenge Co.*, 209 F. 393, 404–405 (C.A. 2), certiorari denied, 347 U.S. 953; *Wheatland Electric Corp.* v. *National Labor Relations Board*, 208 F. 2d 878, 883 (C.A. 10), certiorari denied, 347 U.S. 966. Cf. *Piasecki Aircraft Corp.* v. *National Labor Relations Board*, 280 F. 2d 575, 591–592 (C.A. 3), certiorari denied, 364 U.S. 933.

replacements.[49] Manifestly, Congress had no such intention.[50]

CONCLUSION

For the reasons stated the judgment of the court below should be affirmed.

Respectfully submitted.

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[49] *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278, and cases there cited at n. 9; *National Labor Relations Board* v. *Buitoni Foods Corp.*, 298 F. 2d 169, 175 (C.A. 3); *National Labor Relations Board* v. *West Coast Casket Co., Inc.*, 205 F. 2d 902, 908 (C.A. 9). See, also, *National Labor Relations Board* v. *Erie Resitor Corp.*, 373 U.S. 221, 226, n. 5, enforcement granted on remand *sub. nom. Erie Technological Products, Inc.* v. *National Labor Relations Board*, 328 F. 2d 723, 726 (C.A. 3).

[50] The background of the provision in question is discussed in Cox, *Some Aspects of the Labor-Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 20–22. The discussion seems incomplete insofar as its fails to note the possible application of the provision where reinstatement would be the normal remedy but the employer asserts that the employee has subsequently been discharged for misconduct. See, *e.g., National Labor Relations Board* v. *Thayer Co.*, 213 F. 2d 748, 753 (C.A. 1), certiorari denied 348 U.S. 883. Those questions, however, are not involved in the present case.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et. seq.*) are as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or

modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who

engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * * * *

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

Sec. 10. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

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